(25,804)

SUPREME COURT OF THE UNITED STATES.

20992

OCTOBER TERM, 1916.

No. 974.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, PETITIONER,

vs.

LEWIS APPERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1917.

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No. 2947.

United States Circuit Court of Appeals Sixth Circuit

W. T. HENDRICKSON, JUDGE OF TAYLOR COUNTY COURT, AND J. D. JONES, W. H. BENNETT, A. W. MILLER, L. MORGAN, RUEL EADS AND T. E. WISE, JUSTICES OF THE PEACE OF TAYLOR COUNTY, KENTUCKY,

Plaintiffs in Error,

vs.

LEWIS APPERSON,

Defendant in Error.

Error to the District Court of the United States for the Western District of Kentucky.

RECORD

Original transcript filed July 24, 1916.

TRANSCRIPT OF RECORD.

In the District Court of the United States for the Western District of Kentucky, at Louisville.

W. T. Hendrickson et al., Plaintiffs-in-Error, vs. Lewis Apperson, Etc., Defendants-in-Error.

SUPPLEMENTAL AND AMENDED PETITION FOR MANDAMUS—Filed May 6, 1916.

Now comes Lewis Apperson and states that this action is prosecuted for his benefit; that he is a citizen and resident of Kentucky, and the defendants are respectively the county judge and magistrates of Taylor county, and collectively constituting the Fiscal Court of that county.

That heretofore, to wit, on the 20th day of January, 1899, plaintiff filed herein his petition, wherein he sought to recover from Taylor county the sum of $2,963.99, with interest at the rate of 6% per annum from April 10, 1899; that certain proceedings were had thereon, with the result that judgment was rendered against said county for the following sums, to wit:

$2,963.99, with interest from April 10, 1899, at the rate of 6% per annum, and for the sum of $65.66 costs; that execution **fieri facias** was issued, directed to the marshal of this court, commanding him to make said amount out of said defendant; that same was placed in his hands while in full force and effect for execution; that on the 27th day of June, 1899, the marshal returned same in substance, "No property found." Said judgment has never been set aside or reversed, and is now in full force and effect, and no part thereof has been paid, except as hereinafter more fully appears.

Plaintiff states that on March 11, 1909, by order duly entered in this court, the then county judge of Taylor county and the then justices of the peace of said county, together constituting the Fiscal Court thereof, were ordered to convene said court at the county seat of Taylor county on the first Tuesday in April, 1909, and to proceed to make a levy upon all property then assessed for and subject to taxation for state revenue purposes, including the amount given in under the equalization law, and said levy to be sufficient to pay off the following sums, to wit:

(1) The sum of $2963.99, with interest at 6% from April 10, 1899;

(2) The sum of $65.66, costs of the original suit against Taylor county;

(3) The sum of $120.49, costs heretofore accrued in this case, and $200.00 estimated future costs, and to cause the bills therefor to be placed for collection in the hands of the sheriff of Taylor county, or other person empowered by law to collect the said revenue for said county, and upon default of said sheriff or collector to execute bond and qualify for said office, then to appoint a collector for that purpose, and to require him by such order of appointment to collect the taxes therein provided for, as well as the ordinary state and county revenue, and to give bond for same as required by law.

Plaintiff states that pursuant to said order of this court the Fiscal Court of Taylor county met at the county seat on the first Tuesday in April, 1909, and levied a tax of thirty-five cents upon the property of said county assessed and subject to taxation, as aforesaid, upon the total assessed value of said property as it then appeared in the sum of $1,800,000.00.

Plaintiff states that W. T. Hendrickson is the duly elected and qualified judge of the Taylor county court, and that Ruel Eads, T. E. Wise, Jas. Jones, Asbury Miller, Wm. Bennett and L. Morgan are the duly elected and qualified justices of the peace of said county, and that all of said defendants together constitute the Fiscal Court of said county, and that it is their duty to levy taxes for all county purposes, which taxes consist of a pole tax on each male inhabitant of said county over twenty-one years of age, not to exceed $1.50, and an ad valorem tax upon all property in said county subject to taxation.

Plaintiff states that it is the duty of said county judge, acting for the county court, to appoint a collector of county taxes in case the sheriff should fail to execute bond or to qualify according to law, or in case of a vacancy in said office of sheriff, or for any other cause.

Plaintiff states that heretofore, to wit, by a judgment duly entered June 15, 1911, this court commanded the then county judge of Taylor county that when he next appoint a sheriff, collector or other officer to collect the county revenue of said county, to embrace in the same order of appointment a direction to the officer appointed that he collect both the levy heretofore made to pay the aforesaid judgment in this case and the levy made, or to be made for county purposes, and that he require of such appointee one bond to cover the collection of each and all of said taxes; that the county judge of said Taylor county failed to appoint anyone, or to secure anyone who would accept the appointment to collect the levy made to pay

the judgment rendered in this action, and that afterwards, upon the 30th day of December, 1912, an agreed order was entered in this court whereby certain conditions of settlement were set out and agreed upon, one of which conditions was that the defendants, for and on behalf of Taylor county, would, on or before the 1st day of February, 1913, or that the Fiscal Court of Taylor county would incorporate in the order directing the levy then to be made for the regular county purposes a levy sufficient to pay in full all of the county's indebtedness then due and remaining unpaid by the defendant, and that both of said levies should be entered in the same order in the year 1913, and a sheriff would be appointed by the county judge of Taylor county to collect the levy. But this plaintiff says that no such levy was ever made or entered by the Fiscal Court of said county, and that by reason thereof, said agreement was by its terms rendered null and void.

But this plaintiff says that afterwards, and on the 1st day of March, 1913, the county of Taylor, through its Fiscal Court, ordered and directed to be paid to this defendant the sum of $1500.00, which was a surplus derived from the county levy for the year 1913; but said stipulation and agreement as to compromise was never performed by said county, in whole or any part thereof, and that the levy of thirty-five cents heretofore referred to, which was intended to pay plaintiff's debt, interest and costs, and which order was made by the Fiscal Court of Taylor county, was made more than five years ago and is now barred by the Statute of Limitations, as this plaintiff believes to be the fact; and that by reason of the agreement entered into December 30, 1912, that levy was sought to be avoided, and that there still remains due and unpaid on plaintiff's debt the sum of $2963.99, with interest from April 10, 1899, at the rate of 6% per annum; and the further sum of $65.66, costs of the original suit against Taylor county; and $120.49 costs accrued in this case, and $200.00 estimated future costs, subject to a credit of $1500.00 paid on the 1st day of March, 1913.

Wherefore, plaintiff prays the court to issue its writ of mandamus, commanding and requiring the defendants to levy a tax upon each one hundred dollars of property assessed for valuation in said county for the year 1916, sufficient to pay plaintiff's aforesaid judgment, interest and costs, and that they be required to include in the order making the levy for ordinary county purposes the aforesaid levy for the purpose of paying the aforesaid judgment; and to further direct the said W. T. Hen-

dricks——, as county judge of Taylor county, that when he next appoints a collector whose duty it shall be to collect any or all items by a levy made by the Fiscal Court of Taylor county for any purpose, he shall embrace in said order of appointment a direction to the officer appointed to collect both the levy made to pay this judgment and the levy made and to be made for any item which may be levied by said Fiscal Court, and that said county judge shall continue to so embrace said directions in the same order of appointment until a collector is appointed who shall qualify as such collector, and said county judge shall exact of him but one and a single bond to cover the collection of the levy made to pay this judgment, as aforesaid, and the item or items of any levy made by the Fiscal Court of Taylor county for any other purpose. Plaintiff further prays that he recover from the defendants all of his costs herein expended, and for all other relief to which he may appear entitled.

Richards & Harris,
Attorneys for Plaintiff.

ANSWER—Filed May 29, 1916.

Defendants, for answer to the petition herein, say:

That prior to the institution of this action, to wit, on January 24, 1916, the county court of Taylor county appointed W. O. Hendrickson collector of state taxes for Taylor county for the year 1916, it having been made to appear to the court that the office of sheriff was vacant, and that one J. A. Sanders, who had been appointed by the court as sheriff of Taylor county, had refused to qualify as such.

Subsequent to the appointment of said Hendrickson as state tax collector, he, on January 27, 1916, duly qualified as such by executing bond as required by law. A duly attested copy of the order of the Taylor county court appointing said Hendrickson, and showing his

qualification aforesaid, is filed herewith as part hereof, marked "Exhibit A."

Prior to the institution of this action, to wit, on April 6, 1916, the Fiscal Court of Taylor county made a levy of taxes for the year upon all property subject to taxation in Taylor county in the following terms, to wit:

"For the purpose of paying the claims allowed by the Fiscal Court of Taylor county at its October Term, 1915, and at its April Term, 1916, and the claims allowed by the county judge for the fiscal year 1916, being for the current and necessary expenses for said state county business. It is ordered by the court that there be, and there is hereby, levied an ad valorem tax of fifty cents of each one hundred dollars worth of taxable property as assessed and equalized for taxation for the year 1916, for state county purposes, and a state county poll tax of one dollar and fifty cents on each poll residing in Taylor county as assessed for the year 1916. This amount, when collected, to be apportioned as follows:

Ten cents on each one hundred dollars as assessed and equalized for taxation along with the state county poll tax of one dollar and fifty cents be used for paying the salaries of the county officials and the incidental expenses for the year 1916. And that five cents on each one hundred dollars worth of taxable property as assessed and equalized for taxation for the year 1916, be used for paying off the pauper cla[illegible]s for the aforesaid year. And that thirty-five cents on each one hundred dollars, as assessed and equalized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor county for the year 1916. Four thousand, six hundred dollars ($4,600.00) be used in connection with like sum from the state for the purpose of continuing the ---------- on the state roads in the aforesaid county, which are now under construction.

It is further ordered by the court that there be, and there is hereby, levied an ad valorem tax of twenty cents on each one hundred dollars worth of taxable property of Taylor county, as assessed and equalized for taxation for the year 1916, and a poll tax of one dollar on each poll in Taylor county as returned by the assessor for the year 1916, for the purpose of maintaining and equiping the common school for the year 1916."

Answer.

A duly attested copy of the order of said Fiscal Court, making said levy, is filed herewith as part hereof, marked "Exhibit B."

Defendants further say that under the statutes of Kentucky, as construed by the Court of Appeals of Kentucky, the County Court of Taylor county has a discretion as to whether it will appoint one person to collect all moneys due the state and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes, such as the payments of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond. And they respectfully submit that this honorable court cannot, by its judgment, control the aforesaid discretion of the County Court of Taylor county, given it by the statutes of Kentucky as construed by the Court of Appeals of Kentucky.

Jeff. Henry,
Abel Hardin,
Bruce & Bullitt,
Attys. for Defts.

Defendant, W. T. Hendrickson, being duly sworn, says he is one of the defendants in the above styled case, and that the statements of the foregoing answer are true.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 26th day of May, 1916.

My commission expires Feby. 16, 1920.

[Seal] M. W. Tucker,
Notary Public, Taylor County, Kentucky.

Exhibit A.

At a special term of the Taylor County Court, commenced and held at the court house in Campbellsville, Ky., on the 24th day of January, 1916.

Present: The Hon. W. T. Hendrickson, judge.

It appearing to the court that office of sheriff is vacant in Taylor county, and that on the 10th day of January, 1916, the court appointed J. A. Sanders as sheriff of Taylor county, Kentucky, and that on the 15th day of January, 1916, that said Sanders failed and refused to qualify, and that on account of the failure of said Sanders to qualify as sheriff, and there being no tax collector in Tay-

Answer.

lor county, Kentucky, for the collection of the state tax for the year 1916. It is now ordered by the court that W. O. Hendrickson be, and he is hereby, appointed state tax collector for Taylor county, Kentucky, for the year 1916, and before he shall collect said tax, he will execute bond according to law, conditioned that he will only collect state taxes.

Ordered that court adjourn until court in course.

W. T. Hendrickson, J. T. C. C.

At a special term of the Taylor County Court, commenced and held at the court house in Campbellsville, Ky., on the 27th day of January, 1916.

Present: The Hon. W. T. Hendrickson, judge.

This day came W. O. Hendrickson, special tax collector of Taylor county, and open court, produced his quietus for the state revenue for the year 1915.

Thereupon said W. O. Hendrickson, special collector aforesaid, with the Maryland Casualty Company of Baltimore, Maryland, his sureties, executed to the commonwealth of Kentucky a bond for the collection and payment of the state revenue for the year 1916, which bond is in words and figures as follows:

Sheriff's Bond for State Revenue.

We, W. O. Hendrickson, special collector of Taylor county, and Maryland Casualty Company, of Baltimore, Maryland, his sureties, bind and obligate ourselves jointly and severally to the commonwealth of Kentucky in the penal sum of fifteen thousand dollars ($15,000) that W. O. Hendrickson, special tax collector, shall faithfully perform his duties.

Witness our signatures this the 27th day of January, 1916.

W. O. Hendrickson,
Maryland Casualty Company,
By C. W. Jefferson,
Attorney-in-Fact.

State of Kentucky, County of Taylor, set.:

I, C. W. Ramsey, clerk of the county and state aforesaid, do hereby certify that foregoing is a true and correct copies of the order appointing W. O. Hendrickson special tax collector of Taylor county for the year 1916, together with his qualification and bond, said orders and bond being duly recorded in order book No. 9, pages 618 and 619, of the records of the Taylor county clerk's office.

Witness my hand this the 20th day of May, 1916.

C. W. Ramsey,
Clerk of the Taylor County Court.

Answer.
Exhibit "B."

April Term, 6th day of April, 1916.

Court met pursuant to adjournment at the court house in Campbellsville, Ky., on the sixth day of April, 1916.

Present: The Hon. W. T. Hendrickson, presiding judge of the Taylor County Fiscal Court, together with the following justices, W. H. Bennett, J. D. Jones, jr., Lewis Morgan, A. W. Miller, Ruel Eades and T. A. Wise, for the purpose of paying the claims allowed by the Fiscal Court of Taylor county at its October Term, 1915, and at its April Term, 1916, and the claims allowed by the county judge for the fiscal year 1916, being for the current and necessary expenses for said state county business.

It is ordered by the court that there be, and there is hereby, levied an ad valorem tax of fifty cents of each one hundred dollars worth of taxable property, as assessed and equealized for taxation for the year 1916, for state county purposes, and a state county poll tax of one dollar and fifty cents on each poll residing in Taylor county as assessed for the year 1916, this amount when collected to be apportioned as follows:

Ten cents on each one hundred dollars as assessed and equealized for taxation along with the state county poll tax of one dollar and fifty cents be used for paying the saleries of the county officials and the incidental expenses for the year 1916; and that five cents on each one hundred dollars worth of taxable property as assessed and equealized for taxation for the year 1916, be used for paying off the pauper claims for the aforesaid year; and that thirty-five cents on each one hundred dollars as assessed and equealized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor county for the year 1916, four thousand six hundred dollars (4600.00) be used in connection with like sum from the state for the purpose of continuing the work on the state roads in the aforesaid county, which are now under construction. It is further ordered by the court that there be, and there is hereby, levied an ad valorem tax of twenty cents on each one hundred dollars worth of taxable property of Taylor county as assessed and equealized for taxation for the year 1916, and a poll tax of one dollar on each poll in Taylor county as returned by the assessor for the year 1916, for the purpose of maintaining and equiping the common schools for the year 1916.

Amended Answer.

State of Kentucky, County of Taylor, set.:

I, C. W. Ramsey, clerk of the state and county aforesaid, do hereby certify that the above is a true and correct copy of the levy made by the Fiscal Court of Taylor county, Kentucky, on the 6th day of April, for the fiscal year of 1916, the foregoing levy being duly recorded in order book No. 2, page 410, of the records of the Taylor county clerk's office.

Witness my hand this the 20th, 1916.

C. W. Ramsey,
Clerk of the Taylor County Court.

AMENDED ANSWER—Filed May 29, 1916.

Defendants, for amendment to their answer herein, say that the county of Taylor has heretofore entered upon, and is still, continuing the work of constructing and improving public roads in Taylor county known as "State Aid Roads," pursuant to provisions of Sect. 4356x of the Kentucky Statutes, being an act entitled "An Act to create and establish a system of public state roads, and to provide for the construction and maintenance thereof, and which was approved on the 24th day of March, 1914, being roads which, when completed, will connect the county seats of Taylor with the county seats of the other counties. That said work began during the year 1915, and is still continuing. That Taylor county contributed moneys in the year 1915 for said work, and the state of Kentucky contributed an equal amount for the same, and that for the year 1916 Taylor county, as shown by the Fiscal Court order of April 6, 1916, to wit, Exhibit B with the answer herein, expects to contribute during the year 1916, $4,600.00 toward the cost of said work, which amount was appropriated by said order, and will be entitled to receive from the state

of Kentucky an equal amount as a contribution toward the payment for said work. And said work has thus far been done, and is being done, and is required by said statute to be done under the direct supervision and control of the state of Kentucky.

Bruce & Bullitt.

SECOND AMENDED ANSWER—Filed May 29, 1916.

Defendants, for further answer herein, say that the construction and improvement of public roads in Taylor county known as state aid roads, and which Taylor county has begun, as stated in the first amended answer herein, is work which has been done and is continued not only under the provisions of Sect. 4356x of the Kentucky Statutes, being an act entitled "An Act to create and establish a system of public state roads and to provide for the construction and maintenance thereof," approved March 24, 1914, but also under the provisions of Sect. 4356w of the Kentucky Statutes, being an act entitled "An Act declaring certain public roads a system of public state highways, and public works of the state of Kentucky," approved March 24, 1914. And they further say that the Fiscal Court did heretofore, in the year 1915, pass a resolution stating that the public interest demanded the improvement of three roads, to wit:

(1) The Spurlington road from Campbellsville, the county seat of Taylor county, to the boundary line between Taylor and Marion counties, being the road from Campbellsville to Lebanon, thus connecting the county seats of Taylor and Marion counties; and,

(2) The Greensburg road from Campbellsville to the boundary line between Taylor and Green counties, being the road from Campbellsville to Greensburg, thus connecting the county seat of Green county; and,

(3) The Saloma road from Campbellsville to the

boundary line between Taylor and Larue counties, being the road connecting Campbellsville and Hodgenville, the respective county seats of Taylor and Larue counties; and did request that said roads be constructed as provided in the legislative acts aforesaid, and did in said resolution describe said roads to be constructed. And they further say that the Fiscal Court, after the passage of said resolution, did cause a survey of said roads to be made, with plans, profiles and specifications of the work as provided by said statutes, and same were submitted to the Fiscal Court of said county with an estimate of the cost of the work, and were approved by said court and were then submitted to the state commissioner of public roads of Kentucky for his approval or rejection, and were approved by him; and work was begun upon said roads in accordance with said plans and specifications, in the year 1915, and on account of such work, Taylor county contributed two thousand ($2,000.00) dollars, and the state of Kentucky contributed two thousand ($2,000.00) dollars.

Said work, however, upon said roads was not completed in the year 1915, but is to be continued during the year 1916, and Taylor county has, as shown by the order of its Fiscal Court, a copy of which has heretofore been filed, appropriated forty-six hundred ($4,600.00) dollars to be applied on account of the cost of constructing said three roads, and has applied to the state of Kentucky, in accordance with the provisions of the act aforesaid, to contribute an equal amount, to wit: Forty-six hundred ($4,600.00) dollars; and the state of Kentucky has agreed to do so upon the payment by Taylor county of the forty-six hundred ($4,600.00) dollars, which it has agreed to contribute.

Defendants further say that, in accordance with the provisions of the legislative acts aforesaid, the commissioner of public roads has established rules and regulations regulating the construction and improvement of roads under said legislative acts, and Taylor county has in all respects complied with said rules and regulations, and with the provisions of said statutes; and, as aforesaid, the said construction work upon said three roads has been begun and is in progress, but has not been completed.

Defendants further say that the total assessed value of property in Taylor county for the year 1916 is about two million, one hundred thousand ($2,100,000.00) dollars; and that the forty-six hundred ($4,600.00) dollars appropriated by said order of the Fiscal Court as Taylor coun-

ty's contribution towards the construction of said three state aid roads is very considerably more than one-half of the total amount that will be raised under said Fiscal Court's 35-cent levy for roads and bridges for the year 1916, if all of said levy should be collected.

Wherefore, defendants pray to be hence dismissed, and for their costs.

Jeff. Henry,
Abel Hardin,
Bruce & Bullitt,
Counsel for Defendants.

W. T. Hendrickson says he is one of the defendants in the above styled action, and that the statements of the foregoing amended pleading are true.

W. T. Hendrickson,

Subscribed and sworn to before me by W. T. Hendrickson this 29th day of May, 1916. My commission expires January 29, 1920.

Katherine Arnett,
Notary Public, Jefferson Co., Ky.

DEMURRER—Filed May 29, 1916.

Comes the plaintiff and demurs to the answer and amended answer of W. T. Hendrickson, &c., because it does not state facts sufficient to constitute or support a defense.

W. O. Harris,
Atty. for Complainant.

OPINION—Filed May 29, 1916. Walter Evans, Judge.

The plaintiff's demurrer to the defendants' answer raises questions which we have often considered and decided in the course of the many years of litigation growing out of the bonded indebtedness of Green and Taylor counties, respectively, incurred by each in aid of the construction of a certain railroad. The indebtedness of both counties is alike; it grew out of the same railroad situation and similar legislation, and the character of the resistance made by each county against the payment of the debts has been the same. We have, therefore, quite a settled jurisprudence in this connection, at least so far as this court is concerned.

The validity of the indebtedness must be regarded as having been settled by the decision of the Supreme Court in Green County v. Quinlan, 211 U. S., 582.

The routine steps taken in resisting payment after the validity of the indebtedness had been settled by the decision of the Supreme Court have been practically uniform and as follows:

First—A contest upon the validity of the bonds being hopeless, the first resistance appears when a writ of mandamus is applied for, requiring the Fiscal Court to make a levy of taxation to pay the debt.

Second—Failing to prevent the writ of mandamus, and after the taxation has been levied and proceedings for its collection have begun by putting or trying to put tax books in the hands of the sheriff, that officer either refuses to qualify, or, having qualified, resigns.

Third—A collector of state taxes is then appointed separately, which, under the law of Kentucky, is admissible.

Fourth—A collector of county taxes is then appointed, who usually refuses to accept the office if he is required to collect taxation to pay the railroad debts at the same time and under the same bond taken from him for the collection of the other county taxation, or he resigns if that requirement is made after he has qualified.

This brings the creditor to a standstill. It was perceived, however, that the county could not collect taxes for paying its other liabilities, especially the taxes necessary to pay the salaries of its officers unless a collector should be appointed, and so an attempt became customary to place all the assessments for county purposes in the hands of the collector, except that which levied taxes for the payment of the railroad bonds, and a creditor owning those bonds would find it impossible to obtain a result favorable to himself if he could not have the taxation for his benefit levied and collected simultaneously

with the other taxation by the collector, and as we thought one county debt was as sacred as another, we enforced the Kentucky Statute. The county officers who wanted their salaries paid usually found that they could be elected more easily if they opposed the payment of the bonded indebtedness. Their appeal to the spirit which demanded a repudiation of the bonded indebtedness usually secured them popular favor, and it was very plain that if the taxes for the salaries of the officers and taxes for the payment of the ordinary county expenses could all be collected, and those necessary to pay the railroad bonds could be left out, things would move quite satisfactorily to those who desired to repudiate the county's bonded indebtedness. We did not concur in this plan, and concluded that this state of case should not be tolerated, inasmuch as the bonded indebtedness has been found by the Supreme Court to be a valid one. So it became our habit, under Section 4131 of the Kentucky Statutes, to require the County or Fiscal Court, whichever had control of the matter, to make an assessment covering all, and to require that the collector, under such circumstances, should collect all alike, or else collect none, and in order to accomplish this, our writs of mandamus would require that there should be exacted from any sheriff or collector who collected county taxation a bond which would include alike an obligation to collect the levy for the railroad bonded indebtedness and the taxation for ordinary county expenses, including salaries of officers. In this way, and in this way only, could the creditors who held the bonds of the county have anything but a mere nominal remedy. Without such a requirement the collector would collect money to cover all the other county expenses, and its officers who got their salaries might laugh at such of its creditors as had taken its bonds. The proper local court was also required, when appointing a collector of county taxes, to make his appointment cover all alike.

Section 4131 of the Kentucky Statutes provided a remedy to meet this situation, and in several instances in the course of this litigation we have heretofore endeavored to enforce that remedy in the way indicated.

The Court of Appeals in Commonwealth, etc., v. Wade's Admr., etc., 126 Ky., 791, had construed that section, and in our proceedings we have followed that construction. It afforded a good remedy for the creditors who held the county's bonds. But at the instance of the two counties named, the legislature of the state in 1906 (Sess. Acts 1906) amended Section 4131 by adding there-

to the following words: "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

In Commonwealth, etc., v. Moody, 150 Ky., 571, the Court of Appeals upheld the amendment. In this case we are asked to accept and to follow that construction. We have been asked heretofore to do so, and have declined, and must again decline upon grounds similar to those controlling us in previous cases, though if the amendment to Section 4131 of the Kentucky Statutes is to be applied only to debts which arise in the future, we see no reason why it might not be enforcible as to them. But as to any indebtedness which existed prior to the amendment of 1906, as the indebtedness in this case did, we must disregard that amendment and will briefly state our reasons for this conclusion:

The meaning of the language of a state constitution or a state statute, as ascertained by decisions of the court of last resort of that state, is always accepted by the federal courts as binding upon them. So are decisions of such courts as to the validity of state legislation under the provisions of the state constitution. But the federal courts are not bound by the decisions of any of the state courts as to the validity of a state statute, if the validity of such statute is challenged upon the ground that it is violative of the Constitution of the United States. These propositions are so familiar as to require no citation of authorities.

The Federal Constitution forbids a state to enact any law which impairs the obligation of a contract. The remedy for enforcing the contract is essentially a part of the contract itself. If a remedy is provided when the contract is created, it may indeed be changed, but only on condition that one equally efficient and equally available is substituted. In this instance the amendment to Section 4131 of the Kentucky Statutes took away the only efficient remedy left the holder of any of the bonds of Taylor county, and instead of providing another equally efficient, left those creditors helpless, or at least dependent upon the caprice of the County Court. It is so plain that this cannot be constitutionally done that we have felt constrained to hold that the creditors who held the railroad bonds of the county were entitled to the remedy as it existed previous to the passage of the amendment of 1906, and especially as Section 4131 which gave that remedy had been upheld in Commonwealth etc., v. Wade's Admr., 126 Ky., above referred to, which was

decided in 1907, but in an action which arose before 1906.

Of course, school taxes (which the Kentucky Court of Appeals has held to be state taxes) will not be affected by this ruling, but will be excepted from it, as will be shown in the judgment herein.

It is insited that the road taxation provided for in the act approved March 24th, 1914, (Acts 1914, 441) is a state tax and stands upon the same footing as the school tax. So far as the taxation of 5 cents on the $100.00 provided for in Section 4 of that act is concerned, the contention is sound, and we cannot and shall not, by our judgment in this case, interfere with that taxation or its collection, but Section 21 of the same act provides that any road constructed or reconstructed under its provisions shall forever be a county road, and "the duty of keeping the same in repair devolves upon the Fiscal Court of the county to be maintained out of the general county fund as provided by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said Fiscal Court."

This act refers to state aid roads, which constitute only a small per cent of the county roads. The expense of maintaining the roads not aided by the state is, of course, a county matter.

It is thus quite clear that the taxation imposed by the Fiscal Court of a county for the purpose of constructing or reconstructing roads is a county expenditure, and not a state indebtedness, and, consequently, that the school tax decision has no bearing upon the question.

The demurrer to the answer is sustained, and if the defendants do not answer further, or manifest a desire to do so, judgment, as prayed for, will be entered.

Walter Evans,
Judge.

JUDGMENT—Filed May 29, 1916. Walter Evans, Judge.

This cause having come on for hearing upon the demurrer of the plaintiff to the answer, as amended, of W. T. Hendrickson, county judge; Ruel Eads, T. E. Wise, James Jones, Asbury Miller, William Bennett and L. Morgan, constituting the Fiscal Court of Taylor county, and having been argued by counsel for complainant and counsel for defendants, and the court being sufficiently advised, delivered its opinion in writing, which is filed, and pursuant thereto it is ordered and adjudged that said demurrer be sustained, to which the defenants excepted.

And the defenadnts declining to plead further, the case came on for hearing upon the motion for mandamus and in chief ,and the court being fully advised, it is considered and adjudged that the defendants, W. T. Hendrickson, county judge; Ruel Eads, T. E. Wise, James Jones, Asbury Miller, William Bennett and L. Morgan, and their successors in office, if any, justices of the peace of Taylor county, said defendants together constituting the Fiscal Court of said county, be, and they are hereby, ordered to convene said court at the county seat of Taylor county on the 20th day of June, 1916, at which time they are ordered to proceed to make a levy upon all of the property which is now assessed for and subject to taxation for state revenue purposes, said levy being sufficient to pay off one-third of the judgment heretofore obtained by this plaintiff against Taylor county, to-wit, the sum of $2,963.99, with interest from the 15th day of April, 1899, until paid, and the sum of $65.66 costs of the original action against Taylor county, and to pay off one-third of the sum of $175.35, costs heretofore accrued in this case, all of which being subject to a credit of one-third of $1,500.00 as of March 1st, 1913.

It is further ordered and adjudged that the said defendants and their successors in office as the Fiscal Court of Taylor county, shall convene said court at the county seat of Tayolr county in the year 1917, and shall make a levy upon all of the property which is then assessed and subject to taxation for state revenue purposes for that year's taxes, sufficient to pay another one-third of the said judgment heretofore obtained by this plaintiff against Taylor county, and one-third of the accrued costs of this suit, subject to a credit of one-third of $1,500.00 as of March 1st, 1913, for the purpose of paying said portion of said jugdment and said costs. And it is further ordered that said last mentioned levy be made at the same time by the same order by which all the other

taxes levied by said Fiscal Court for the year 1917 are levied.

It is further ordered and adjudged that the said defendants and their successors in office, as the Fiscal Court of said Taylor county, shall convene said court at the county seat of said county in the year 1918, and shall make a levy upon all of the property which is then assessed for and subject to taxation for state revenue purposes, said levy being sufficient to pay off the remaining one-third of the said judgment heretofore obtained by this plaintiff against Taylor county, and the remaining one-third of the accrued costs in this suit, subject to a credit of one-third of $1,500.00, as of March 1, 1913, for the purpose of paying off said portion of said judgment and said costs. And it is further ordered that said last mentioned levy be made at the same time and by the same order by which all other taxes levied by said Fiscal Court for the year 1918 are levied.

It is further ordered and adjudged that said defendants and their successors in office, as the Fiscal Court of Taylor county, be, and they are hereby, ordered to place the tax bills for each of the aforesaid levies for collection in the hands of the sheriff of Taylor county, and his successor in office, if any, and upon default of said sheriff to execute bond and qualify for said office, then W. T. Hendrickson, county judge, and his successor in office, if any, constituting the county court of said county, is directed when he next appoints a collector whose duty it shall be to collect any or all items of any levy made, or which may hereafter be made by the Fiscal court of Taylor county for any prupose, to embrace in said order of appointment a direction to such officer appointed to collect both the levy made or which may hereafter be made to pay this judgment and the levy made or which may hereafter be made for any and all items which are levied or which may be levied by said Fiscal Court; and said county judge, acting as said county court, shall continue to so embrace such directions in the same order of appointment until a collector is appointed who shall qualify as such collector by executing proper bond; and said county judge shall exact of him but one and a single bond to collect the levy made, or which may hereafter be made to pay this judgment as aforesaid, and the item or items for any levy made, or which may hereafter be made by said Fiscal Court for any other purpose, except he shall exclude from the same any levy made by the Fiscal Court of Taylor county for school purposes,

and also the five cents on each one hundred dollars of state revenue for the construction of public roads, as provided for by Sect. 4356x, sub-section 4 of the Kentucky statutes. And said defendant and his successors in office, if any, shall continue so to do until this plaintiff's said judgment and the costs as aforesaid have been paid in full.

It is further ordered and adjudged that the defendants herein, and their successors in office, if any, together constituting the Fiscal Court of said Taylor county, shall assemble as such once in every three months and order and have paid to this plaintiff through his attorneys, Richards and Harris, of Louisville, Kentucky, such a proportion of all money that may come into the hands of the treasurer of said Taylor county, or into the hands of any other official or person from taxes levied by said court, as the rate of taxation levied, or which may be levied to pay this plaintiff's judgment, or the portion thereof for which a levy or levies may have been made at said time, bears to the rate of taxation levied by said court for all purposes; and they shall continue so to do until the plaintiff's judgment has been satisfied.

This cause is reserved and retained on the docket of this court for the purpose of entering such orders and of taking such proceedings as may be necessary or proper to enforce the levy and collection of the taxes herein provided for.

To all and each part of this order the defendants and each of them excepts.

ASSIGNMENT OF ERRORS—Filed June 27, 1916.

Defendants herein complain that the court, in trying and determining the above styled cause, erred to the prejudice of defendants as follows:

1. In sustaining the demurrer to the answer of defendants.

2. In holding that the amendment made by the legis-

lature of Kentucky in 1906 to section 4131 of the Kentucky statutes, as it previously existed, would, in enforced, impair the obligation of the contract between plaintiff and Taylor county, and is unconstitutional.

3. In commanding the defendant, W. T. Hendrickson, as county judge of Taylor county, and any successor in said office, whenever a collector of any tax levied, or which may hereafter be levied, by the Fiscal Court of said county (except school taxes), is appointed, to embrace in the order of appointment of said collector that he shall be required to collect the taxes levied, or to be levied, to pay plaintiff's judgment, and shall execute one bond for the collection of all taxes levied by the Fiscal Court, including the taxes levied to pay plaintiff's judgment; and in commanding said county judge, and his successors in office, to continue so to do until plaintiff's judgment and his costs have been paid in full.

4. In refusing to exclude from the taxes which the collector appointed to collect the taxes to pay plaintiff's judgment and other county taxes is required to collect, and for which he is required to give bond, taxes levied by Taylor county for the purpose of helping to build and maintain the public roads of Taylor county which are being constructed pursuant to the provisions of section 4356w of the Kentucky statutes, 1915 edition, being an Act entitled "An Act declaring certain public roads a system of public state highways, and public works of the state of Kentucky," approved March 24, 1914, and section 4356w of the Kentucky statutes, 1915 edition, being an Act entitled "An Act to create and establish a system of public state road. and to provide for the construction and maintenance thereof," approved March 24, 1914.

5. In refusing to exclude from the taxes which the collector appointed to collect the taxes to pay plaintiff's judgment and other county taxes is required to collect, and for which he is required to give bond, taxes levied by Taylor county for the purpose of building and maintaining the public roads of Taylor county.

6. In controlling the discretion which the county judge of Taylor county has by the Statutes of Kentucky, as construed by the Court of Appeals of Kentucky in appointing collectors of revenue, and in refusing to allow said county judge to fix and name, as he might deem proper, in the order aponinting each collector of taxes, what taxes such collector should collect, and for which he should give bond.

7. In ordering that the defendants and their success-

ors in office, constituting the Fiscal Court of Taylor county, should once in each three months, or at all, order and have paid to plaintiff on his judgment such portion of said taxes levied by said court as the rate of taxation levied to pay plaintiff's judgment, or the portion thereof for which a levy or levies have been made at said time, bears to the rate of taxation levied by said court for all purposes.

Wherefore, defendants pray that the judgment entered in the above styled cause on May 29, 1916, be reversed.

Abel Harding,
Helm Bruce,
Attorneys for Defendants.

BOND.—Filed June 27, 1916.

Know all men by these presents, that we, W. T. Hendrickson, judge of the Taylor County Court, Kentucky, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads, and T. E. Wise, justices of the peace of Taylor county, Kentucky, principals; and Maryland Casualty Company, surety, are held and firmly bound unto Lewis Apperson, etc., in the sum of two hundred ($200.00) dollars, to be paid to said Lewis Apperson, etc., or his executor or administrator, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators.

Sealed with our seals and dated this 27th day of June, A. D. 1916.

Whereas, the above named W. T. Hendrickson, J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, have prosecuted a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment rendered in the

above styled cause by the District Court of the United States for the District of Kentucky at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named W. T. Hendrickson, J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, shall prosecute their said writ of error to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

W. T. Hendrickson,
J. D. Jones,
W. H. Bennett,
A. W. Miller,
L. Morgan,
Ruel Eads,
T. E. Wise,

All the foregoing by Helm Bruce, Atty.

Maryland Casualty Company,
C. W. Jefferson, [Seal]
Attorney-in-Fact.

Approved June 27th, 1916.
Walter Evans,
Judge.

ORDER ALLOWING ASSIGNMENT OF ERRORS AND WRIT OF ERROR—June 27, 1916.

This day came the defendants in the above styled cause and tendered their assignment of errors and their petition for a writ of error from the United States Circuit Court of Appeals, and it is now ordered that said assignment of errors be filed and said writ of error be allowed, upon the execution of a bond in the sum of two hundred dollars,

not to operate as a supersedeas. Thereupon appeared the defendants and tendered said bond in the sum of two hundred dollars, with the Maryland Casualty Company, of Baltimore, Maryland, as surety, which bond is hereby approved and ordered filed.

PRAECIPE FOR TRANSCRIPT—Filed June 27, 1916.

The clerk will copy into the transcript on the writ of error herein the following papers, to wit:

1. The amended and supplemental petition filed May 6, 1916.
2. The answer and the first and second amended answers.
3. The demurrer.
4. The opinion of the court filed May 29, 1916.
5. The judgment of the court.
6. The assignment of errors.
7. The petition for writ of error.
8. The appeal bond.
9. The citation and return thereon.
10. This praecipe.
11. Order allowing writ of error and approving bond.

Helm Bruce,
Atty. for Defts.

Service of praecipe accepted this June 28, '16.

W. O. Harris, Jr.,
Atty. for Deft. in Error.

CLERK'S CERTIFICATE.

I, A. G. Ronald, clerk of the District Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 34 pages contain a true and correct transcript of the record and proceedings in the case of W. T. Hendrickson et al. vs. Lewis Apperson,etc., Number 7158, copied in accordance with the praecipe to be found on page 34 of this record, as the same appears from the files and records in my said office.

Witness my hand and the seal of said court this 11th day of July, A. D. 1916.

[Seal] A. G. Ronald,
Clerk.

[Ten-cent revenue stamp attached]

PETITION FOR WRIT OF ERROR.—Filed June 27, 1916.

Defendants, W. T. Hendrickson, judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise justices of the peace of Taylor county, and, with said judge of the County Court, constituting the Fiscal Court of Taylor county, do hereby petition the court for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to bring in review before that court the judgment entered in the above styled cause on May 29, 1916, and the record therein.

Helm Bruce,
Attorney for Defendants.

Allowed: June 27, 1916.
Walter Evans,
Judge.

CITATION.

United States of America, Western District of Kentucky,
Sixth Judicial Circuit, ss.:

To Lewis Apperson, etc.—Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the* 25th day of July next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Kentucky, wherein W. T. Hendrickson, judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, justices of the peace of Taylor county (Kentucky), plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, chief justice of the United States, this 27th day of June, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and fortieth.

[Seal] Walter Evans, Judge.

Service of above citation accepted this June 28, '16.

W. O. Harris, Jr.,
Atty. for Deft. in Error.

WRIT OF ERROR.

The United States Circuit Court of Appeals for the Sixth Circuit.

The United States of America, Sixth Judicial Circuit, ss.:

The President of the United States, To the Honorable Judge of the District Court of the United States for the Western District of Kentucky—Greeting:

Certificate.

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between Lewis Apperson, etc., plaintiff and defendants, W. T. Hendrickson, judge of Taylor county court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, justices of the peace of Taylor county (Kentucky), a manifest error hath happened to the great damage of the said defendants as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you may have the same at Cincinnati, Ohio, in said circuit, on the 25th day of July next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, chief justice of the United States, this 27th day of June, A. D. 1916, and in the 140th year of the Independence of the United States of America.

Allowed by Walter Evans,
United States District Judge.

[Seal] A. G. Ronald,
Clerk of the District Court of the United States for the Western District of Kentucky.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

APPEARANCE OF COUNSEL—Filed July 28, 1916.

William C. Cochran,
Clerk of said Court:

Please enter my appearance as counsel for the Plaintiffs in Error.

Helm Bruce.

MOTION TO ADVANCE CAUSE—Filed Oct. 3, 1916.

Plaintiffs in error in each of the above entitled causes file duly accepted notice to counsel for defendants in error therein, and move the court to advance each of the said causes for an early hearing and decision on account of the public interest in the questions therein involved, and file an affidavit in support of the motions.

Bruce & Bullitt,
Attys. for Plffs. in Error.

AFFIDAVIT IN SUPPORT OF MOTION TO ADVANCE—Filed Oct. 3, 1916.

AFFIDAVIT OF W. T. HENDRICKSON.

W. T. Hendrickson, being duly sworn, and in support of a motion to advance the five above entitled causes for hearing, says:

I am the Judge of the Taylor County Court (of Kentucky), and one of the plaintiffs in error in each of the said causes.

I have honestly and in good faith endeavored to obey and carry into execution the judgment of the United States District Court in each of said causes; and the other members of the Fiscal Court of Taylor County have done likewise.

Said Fiscal Court, of which I am ex officio a member as County Judge, and am the presiding officer, did, on June 20, 1916, in obedience to the judgment in each of said causes, levy an ad valorem tax on all the property in Taylor County subject to taxation, sufficient to pay the amounts required by said judgments to be paid.

On the same day, to-wit, June 20, 1916, the office of sheriff of Taylor County being vacant, and there being no collector for taxes, except State taxes, in Taylor County, the Taylor County Court, of which I was, and am, the Judge, made an order appointing Robert L. Faulkner collector of taxes, other than State taxes, and ordered him, in conformity with the judgment of said court in each of said causes, before entering upon his duties as collector, to make and enter into one single bond, conditioned that he would collect and properly account for the taxes levied, in obedience to the judgments in said causes, and also all taxes, except that levied for schools, under the levy made by the Fiscal Court for the general purposes of the county, all in strict obedience to, and in exact conformity with the order of the said District Court in each of said causes.

Said Faulkner was, and is, a reputable and responsible man of considerable wealth, and one of the best and most influential citizens of Taylor County. And I have understood that he is in favor of paying Taylor County's bonded debt, or such part of it as the county is able to pay. But said Faulkner failed and declined to give bond, or to qualify as collector aforesaid.

After the refusal of said Faulkner to accept said office of collector, or qualify himself to fill it, the County Court

at its August term, to-wit, August 10, 1916, the office of sheriff still being vacant, and there being no collector of taxes, except State taxes, made an order appointing E. N. Tucker collector of taxes, other than State taxes, and directed him, in conformity with the judgment of the court in each of said causes, to execute one single bond for the collection of the taxes levied to pay said judgments, and also to collect the taxes levied for general county purposes.

Said Tucker is also a substantial man, and one of the leading citizens of Taylor County, and understood to be in favor of paying the bonded debt of Taylor County, or such part of it as the county can pay. But said Tucker failed and refused to accept the office, or to qualify himself to fill the same by executing the bond required of him.

I have at all times been willing, and am now willing, as Judge of the Taylor County Court, to appoint any reputable man who may be recommended to the office of collector of taxes in Taylor County, and who may be suggested as being willing to accept said office and qualify by executing the character of bond required by the order of the court in said cases. But no such man has been recommended to me, other than those I have heretofore appointed, as aforesaid, and I know of no one to appoint who, there is any reason to believe, will accept the said office and give the character of bond required.

The result of the impossibility of getting any one to accept the office of tax collector under the conditions required by the judgments in said cases is that no taxes for county purposes of any kind are being collected, or can be collected, in Taylor County, and the public roads and bridges are necessarily being allowed to go unrepaired, and there are no funds to pay for the maintenance of the court house and the jail, and other public properties of the county, or to pay any of the officers of the county for the performance of their official duties.

In other words, the effect of the judgments of the District Court in said cases has been to paralyze the county government of Taylor County, and, at the same time, to accomplish nothing towards the collection of money wherewith to pay any of said judgments.

It is of the utmost importance to Taylor County, and the people thereof, that said causes be speedily heard and determined, so that if it should be decided that the judgments of the District Court therein are erroneous, and that the County Court has a right to appoint a collector

of taxes levied for general purposes, and to permit him to qualify by giving bond for the collection of such taxes; and to appoint a different collector to collect the taxes levied to pay said judgments, as affiant believes the Statutes of Kentucky authorize, this may be speedily done, and the means be thereby procured for carrying on the governmental functions of said county.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 28 day of September, 1916.

M. W. Tucker,
Notary Public, Taylor County, Kentucky.

(Seal)

My commission expires Feby. 16, 1920.

STIPULATION THAT CAUSES BE HEARD TOGETHER—Filed Oct. 28, 1916.

It is hereby agreed between the respective counsel for plaintiffs in error and defendants in error that the five above entitled causes, which involve the same questions, may be heard together.

Helm Bruce for Plffs. in Error.
L. A. Faurest for Elizabeth Creager,
Hugh S. Gardner for Mildred E. Hocker
Defts. in Error.
W. O. Harris, Jr., for Apperson and Sterling Land & Investment Co., Defts. in Error.

Order

Entry

ORDER CONSOLIDATING CAUSES FOR HEARING
—Filed Nov. 10, 1916.

Ordered that since the five above entitled causes involve the same questions they shall be heard and submitted in this court together.

ENTRY—CAUSES ARGUED AND SUBMITTED—Dec. 5, 1916—Before Warrington, Knappen and Denison, C. JJ.

These causes are argued together by Mr. Helm Bruce for the Plaintiffs in Error and by Mr. L. A. Faurest, Mr. W. O. Harris, Jr., and Mr. Lewis Apperson for the Defendants in Error and are submitted to the court.

JUDGMENT—Filed Dec. 15, 1916.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

W. T. Hendrickson, Judge, etc., et al

vs. No. 2947.

Lewis Apperson.

Error to the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be and the same is hereby affirmed with costs.

Opinion

OPINION—Filed Dec. 16, 1916.

Filed Dec. 16, 1916, Wm. C. Cochran, Clerk.

Nos. 2947-2951.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

W. T. HENDRICKSON, Judge of Taylor County Court, and J. D. JONES, W. H. BENNETT, A. W. MILLER, L. MORGAN, RUEL EADS and T. E. WISE, Justices of the Peace of Taylor County, Kentucky,

Plaintiffs in Error.

No. 2947 v.

LEWIS APPERSON,

Defendant in Error.

SAME

No. 2948 v.

ELIZABETH CREAGER.

SAME

No. 2949 v.

HUGH S. GARDNER.

SAME

No. 2950 v.

MILDRED E. HOCKER.

SAME

No. 2951 v.

STERLING LAND AND INVESTMENT COMPANY.

ERROR to the District Court of the United States for the Western District of Kentucky.

Submitted December 5, 1916.

Decided December 15, 1916.

Opinion

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

PER CURIAM. It is here sought to reverse five judgments in mandamus. They were rendered in separate cases which involved the same questions and were decided at the same time. The proceedings in error were heard together here and are passed upon in this opinion. The plaintiffs in error constitute the Fiscal Court of Taylor County, Kentucky, and the peremptory order in each case in terms requires them and their successors, if any, in office: (1) to convene the court at stated times in 1916, 1917 and 1918, and to levy a tax upon the taxable property of the county, payable in three annual installments, sufficient in the aggregate to pay certain unsatisfied judgments which the defendants in error had severally recovered against the county; (2) to place the appropriate tax bills for collection under each levy in the hands of the sheriff, and his successor, if any, in office; and, upon failure of the sheriff to qualify, the order in each instance directs (3) the county judge, and his successor, if any, in office, constituting the county court, to take steps necessary to collect such tax when appointing a collector of taxes.

The cases, except as to a road tax, are controlled by the decisions of this court in *Tucker* v. *Hubbert*, 196 Fed. 849, and *Graham* v. *Quinlan*, 207 Fed. 268, unless error was committed, as counsel claim, in the decision in *Graham* v. *Quinlan*. The contention is that we there erroneously construed the decison in *Commonwealth* v. *Moody*, 150 Ky. 571, touching the effect of an amendment made March 15, 1906, to section 4131 of the Statutes of Kentucky. Acts 1906, p. 153 (sec. 3); 2 Ky. Stat., Carroll ed. 1915, sec. 4131(3). The error so claimed concerns a further portion of each order. These orders also provide in substance that when the county judge, or his successor, if any, in office, shall appoint a collector of taxes, he shall embrace in the order of appointment a direction to the officer to collect in addition to the usual levies of taxes also the levies to pay the judgments mentioned, and shall exact of the collector a single bond to secure collection of all the levies. Each order, however, excepts any levy made by the fiscal court for school purposes, and also "the five cents on each one hundred dollars of state revenue for the construction of public roads."

In *Graham* v. *Quinlan* (at p. 272) we considered the decision in the Moody case, and we do not see any sufficient reason to change the views we there expressed,

either as to that decision or the effect of the amendment of 1906. It is true that the amendment in terms relieves the collector of any duty "to give bond for and collect" taxes not "mentioned or provided for in the order of the county court appointing him." Before the amendment no special certification of the county levy was required to be made to the sheriff or collector in order to make the tax collectible by either; it was the duty of each to take notice of levies made by the fiscal court, and to collect and apply the taxes; and the failure of either to do so rendered the defaulting official responsible under his bond (*Commonwealth* v. *Wade's Adm'r*, 126 Ky. 791, 801). The amendment was in form appropriate to ameliorate this condition at least as to the collector; it relieved him, as well as his sureties, from the peril of overlooking existing levies; but the language fails to indicate any purpose to do more than this, save only to impose upon the county court a duty of certification of levies when appointing a collector. The amendment did not change the purport or effect of any levy itself. A tax levy imports a necessity for its existence and a purpose to collect it. The power to impose a tax would be futile in the absence of effective means for its collection. Upon the sheriff's failure to qualify, the county judge, in his capacity as the county court, is empowered to appoint a collector of taxes; and the amended section, by clear implication, devolves a duty upon the county court exercising this power to provide in its appointing order for the collection of the existing county tax levies. This, as it seems to us, is the natural import and meaning of the amended section in its entirety, and, consequently, is expressive of the legislative intent. It is insisted, however, that the amendment empowers the county court to appoint two or more collectors and to mention or provide for the collection of such taxes, and such only, in the several orders of appointment as the court shall deem fit; and, aside from the road tax before alluded to, this is the effect of the only defense here offered. It is particularly to be noticed that no objection is made to the portions of the peremptory orders that require levies to be made to pay the unsatisfied judgments; the complaint is that the orders collectively, as well as separately, restrict the county court to the appointment of a single collector with a single bond. Certainly the words comprised in the amendment itself do not in terms vest any appointing power. The right to appoint a plurality of collectors of taxes ought to be traceable to some distinct

legislative authority. The only language expressly creating the power of appointment is contained in the old portion of section 4131 and remains unchanged; and, as already indicated, the construction which that language received in the Wade case (126 Ky., at 799), limiting the power of appointment to a single collector to collect the county revenue, including any special assessment, ought to be followed unless the decision in the Moody case requires a different construction. The only issue involved in the Moody case was whether Moody, who had been appointed as a special tax collector after the amendment of 1906, was responsible for failure to collect a tax not mentioned in his order of appointment. Plainly, this did not call for a construction of the appointing power; it concerned only the effect of omission to mention a particular tax in an appointing order. It is clearly to be inferred from the records in the instant cases, not to speak of the records in *Tucker* v. *Hubbert* and *Graham* v. *Quinlan*, that no person would accept an appointment and furnish a bond, with responsible sureties, to collect simply and solely a tax levy to pay these judgments; in short, the logic of the interpretation urged in behalf of plaintiffs in error is to impute to the legislature a purpose to sanction repudiation of acknowledged county indebtedness. We can not accept this view. We can not believe that language appropriate to require certification of tax levies to a tax collector for the protection of himself and his sureties was intended also to justify multiplying collectors and distributing the items of levy among them at the will or the caprice of the appointing official. The complaint at bottom is not that the services in themselves are too great for a single collector; it is that they are affected by the existence of bitter opposition to payment of these unsatisfied judgments. The circumstance that such hostility prevails in a particular county against a single item of its tax levy can not stand as a warrant for severance of the levy. The statute is a general law and must have uniform operation throughout the state. The plaintiffs in error can not be heard both to concede
" to pay these judgments to be right and affirm
to be wrong. Simple justice and good con-
also the law, require provision to be made
agency and guaranty to collect this tax as a
ction of the regular county levy; and if collec-
ose portions of the levy which the taxpayers
g to pay can not be effected in this way, the
st lie with the county itself. Our conclusion, of

course, renders it unnecessary to consider the question determined below whether the effect of the amendment was to destroy an existing remedy, without substituting one equally efficacious, to enforce collection of the judgments, and so operated to impair the contracts.

It remains to consider whether the road tax to which allusion has been made is a state tax and not a county tax. Here again counsel lay stress upon the question of collectorship. If the tax is a county tax, its collection will fall within the province of the county tax collector; but if it is a state tax, its collection must be made through the state tax collector who appears to have been appointed by the county court January 24, 1916. The road tax is one of the items of the general county levy, to-wit:

"That thirty-five cents on each one hundred dollars as assessed and equalized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor County for the year 1916, four thousand six hundred dollars ($4600) be used in connection with like sum from the state for the purpose of continuing the work on the state roads in the aforesaid county, which are now under construction."

It is the item of $4,600 thus provided for that is in dispute. The statutes that are pertinent here were enacted by the legislature of Kentucky on March 24, 1914; and since the first act is dependent for its execution upon the second, the two acts must necessarily be considered together. One is entitled "An act declaring certain public roads a system of public state highways, and public works of the State of Kentucky." The other statute is entitled "An act to create and establish a system of public roads and to provide for the construction and maintenance thereof." Acts 1914, pp. 440, 441; 2 Ky. Stat., Carroll ed., 1915, sections 4356w, 4356x. The first of these acts provides that the system of highways to which it in terms relates shall consist of roads connecting county seats of adjoining counties within the state, and also county seats of state border counties with those of adjoining counties in the adjacent states. The second act invests the commissioner of public roads with general supervision of all public roads and bridges that "are being constructed, improved or maintained in whole or in part by aid of state money," and would seem to include roads designed to connect county seats provided for in the first act (subsections 1 and 2 of second act).

Further provision is made for raising money through taxation for the purpose of furnishing such state aid and for apportioning the money among the several counties applying for state aid. It is not necessary to recite the details of the second act, since it distinctly provides (subsection 21):

"Any road constructed or reconstructed under the provisions of this act shall forever hereafter be a county road and the duty of keeping the same in repair devolves upon the fiscal court of the county to be maintained out of the general county fund as provided by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said fiscal court."

Thus, the plan considered as an entirety would seem to provide for state aid of county roads rather than county aid of state roads. It is true that both of these acts in general terms call the roads there mentioned "public state highways," yet this is consistent with the specific provision, just quoted, which expressly invests every such road with the characteristics of "a county road," and requires their maintenance later by the several fiscal courts of the counties. It was manifestly quite as competent for the law-making body to provide that these highways should each be a county road as it was to provide that they should receive state aid. All public roads are in one sense state highways, since the general rule is to provide for their construction, improvement and repair through local agencies created in pursuance of legislative enactment; but here the purpose to treat these highways as local roads is distinct. It results, we think, that taxes levied as here by county agencies are county taxes and are to be collected by the county tax collectors. We discover nothing in the statutes in question which would prevent any of the counties from securing such state aid under levies and collections of taxes made through purely county agencies. Indeed, the facts alleged in the pleadings of the instant cases and by general demurrer admitted, set out a plan to secure state aid under these statutes through appropriation and use of the $4,600 in dispute. The plan relates to "the improvement of three (named) roads" which are designed to connect the county seat of Taylor County with the county seats of certain adjoining counties. The aid sought is under an arrangement alleged to have been made with its officials whereby the state is to contribute

a like sum ($4,600) for the same object. In other words, the total sum of $9,200 is intended to be secured and applied toward the improvement of these roads. Unless the desired aid is to be obtained in this way, it can not under the present records be secured. If the plan of Taylor County had been to issue bonds under the acts sufficient to procure the total sum desired ($9,200), and to use the money in the improvement of the three roads before applying for state aid, the county might after executing the plan have secured state aid to the same extent as it now proposes, and then have applied the sum so received from the state to ordinary county objects (*Mitchell* v. *Knox County Fiscal Court*, 165 Ky. 543, 550-553); and this tends strongly to support the conclusion that the road tax in question is a county tax and not a state tax. The claim of analogy between the instant tax and an ordinary school tax fails. The road tax originates with the fiscal court, the school tax with the board of education; the object of the road tax is to construct or improve county roads, the object of the school tax is to procure and support an exclusively state system of public schools (*City of Louisville* v. *Commonwealth for School Board*, 134 Ky. 488, 494; *Ramsey* v. *County Board of Education*, 159 Ky. 827, 831, 832).

It follows that the judgment in each of the cases must be affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of W. T. Hendrickson, Judge, etc., et al., v. Lewis Apperson, No. 2947, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of February, A. D. 1917.

William C. Cochran,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

(Seal)

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which W. T. Hendrickson, Judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, Justices of the Peace of Taylor County, Kentucky, are plaintiffs in error, and Lewis Apperson is defendant in error, No. 2947, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, *ss.*

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the *the* record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 31st day of March, A. D. 1917, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

United States Circuit Court of Appeals.

No. 2947.

W. T. HENDRICKSON, Judge of the County Court of Taylor County Kentucky, Plaintiff in Error.

vs.

LEWIS APPERSON, Defendant in Error.

Stipulation.

It is hereby stipulated that the certified copy of the transcript of record in the above entitled cause, heretofore filed in the Supreme Court of the United States, with a petition for a writ of certiorari, may be taken as a return to said writ.

W. OVERTON HARRIS,
Of Counsel for Def't in Error.
HELM BRUCE,
Att'y for Pl'ff in Error.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the City of Cincinnati in said circuit this 31st day of March, A. D. 1917.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] File No. 25,804. Supreme Court of the United States. No. 974, October Term, 1916. W. T. Hendrickson, Judge, etc., vs. Lewis Apperson. Writ of Certiorari. Filed Mar. 29, 1917. Wm. C. Cochran, Clerk U. S. C. C. A., 6th Cir.

[Endorsed:] File No. 25,804. Supreme Court U. S., October term, 1916. Term No. 974. W. T. Hendrickson, Judge, etc., Petitioner, vs. Lewis Apperson. Writ of Certiorari and return. Filed April 3, 1917.

Office Supreme Court, U. S.
FILED
MAR 7 1917
JAMES D. MAHER
CLERK

No. 427

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, - - Petitioner,

versus

LEWIS APPERSON, - - - - - Respondent.

Petition for a Writ of Certiorari and Brief in Support of the Petition.

HELM BRUCE,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

OCTOBER TERM, 1916.

W. T. HENDRICKSON, ET AL., - - *Plaintiffs in Error,*

versus

LEWIS APPERSON, - - - - - *Defendant in Error.*

NOTICE.

Notice is hereby given that on Monday, March 12, 1917, at the opening of court on that day, W. T. Hendrickson, plaintiff in error in the above-entitled cause, will submit to the Supreme Court of the United States in the city of Washington, D. C., a petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Sixth Circuit, in said cause; and a copy of said petition, and of the brief in support thereof, is herewith served upon you.

HELM BRUCE,
Counsel for W. T. Hendrickson.

Service of the foregoing notice, and of a copy of the petition and brief therein referred to, is hereby acknowledged, this 21st day of February, 1917.

W. OVERTON HARRIS,
Counsel for Lewis Apperson.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, - - *Petitioner,*

versus

LEWIS APPERSON, - - - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

W. T. Hendrickson, who is the Judge of the County Court of Taylor County, Kentucky, presents this petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to review its judgment in a case wherein that court affirmed a judgment of the United States District Court for the Western District of Kentucky, in a cause wherein respondent herein was plaintiff, and this petitioner and others were defendants, and wherein said District Court granted a mandamus at the instance of respondent against this petitioner.

A certified copy of the entire transcript of the record in said cause, including the proceedings in the said

Circuit Court of Appeals is presented with this petition, as an exhibit thereto.

As shown by a comparison between the opinion of the Circuit Court of Appeals, contained in said record, and the opinion of the Court of Appeals of Kentucky in the case of Commonwealth v. Moody, 150 Ky. 571, there is a direct conflict between them as to the true construction of a statute of Kentucky, regulating, and vitally affecting, county government in the State of Kentucky, and vitally affecting the duties of this petitioner as Judge of the County Court of Taylor County, Kentucky.

THE MATTER INVOLVED.

Respondent is a creditor of Taylor County, Kentucky. Judgment was obtained on the debt against that county in the United States District Court for the Western District of Kentucky, upon which execution was issued, and was duly returned, in substance and effect, "no property found." Respondent then instituted another action in the same court against petitioner as the Judge of the County Court of Taylor County, and against the several Justices of the Peace of that county, which Judge and Justices constitute the Fiscal Court of the county, in which a mandamus was sought against those officers, directing them to levy a tax upon the taxable property in the county, sufficient to pay the judgment against the county. To this part of the prayer for relief there was never any objection on the part of the officers of the county; and when the judgment was entered commanding the levy, it was promptly made.

But respondent (plaintiff therein) prayed for and obtained more than a judgment simply directing the levy of the tax to pay the debt. The facts concerning the additional prayer and the additional relief obtained are as follows:

By the Statutes of Kentucky the sheriff of a county is the collector of both State and county taxes in his county. But in Taylor County, owing to an unfortunate condition of affairs, there has been no sheriff for many years. In this contingency, the statute makes it the duty of the County Court to provide for the collection of taxes by appointment of a collector, or collectors.

The statute in question is §4131 of the Kentucky Statutes (Edition of 1915), and is as follows:

> "§4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the County Court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the County Court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the County Court, and if the bond be not executed within said time the appointment of another collector may in like manner, be made and qualified; but such collector shall only be required to give bond for and collect

such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

The Court of Appeals of Kentucky, in the case of Commonwealth, etc., v. Moody, 150 Ky. 571, in construing the statute just quoted, has held that the County Court can, if it sees proper, appoint two, or more, collectors for taxes due the county, specifying in each order of appointment just what taxes are to be collected by the appointee therein named, and taking from each appointee a bond to collect the taxes specified in his order of appointment; that the County Court may, therefore, appoint one collector to collect taxes levied for ordinary county governmental purposes, and take from him a bond to collect those taxes, and a different collector to collect taxes levied to pay the debts of the county, and take from him a bond to collect those taxes.

But the respondent herein, in the petition filed in the District Court, relying upon two opinions in cases formerly decided by the United States Circuit Court of Appeals for the Sixth Circuit, in which a different view was taken as to the construction of this statute, prayed for an order commanding the County Judge that, when he should next appoint a collector, whose duty it should be to collect *any* county tax, levied for *any purpose*, he should embrace in that order of appointment a direction to the appointee to collect *the levy made to pay plaintiff's judgment*, and the levy made to pay any other item of county tax, and further commanding the County Judge to take from such appointee "*but one and a single bond*

to cover the collection of the levy made to pay this judgment, as aforesaid, and the item or items of any levy made by the Fiscal Court of Taylor County *for any other purpose*" (Rec., 4).

Petitioner, as defendant to that action, answered to the effect that, under the statute of Kentucky, as construed by the Court of Appeals of Kentucky, "the County Court of Taylor County has a discretion as to whether it will appoint one person to collect all moneys due the State and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes, such as the payment of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond." And he submitted that the United States District Court could not, by its judgment, control the discretion of the County Court of Taylor County, given it by the Statutes of Kentucky as construed by the Court of Appeals of that State (Rec., 6).

A demurrer to the answer was sustained, whereupon the petitioner declined to plead further, and a judgment was entered, in conformity with the prayer of the petition, in effect requiring petitioner, when he, as Judge of the Taylor County Court, should next appoint a collector

to collect *any county taxes* which had been levied by Taylor County, to provide in the order appointing such collector, that he should collect the taxes which had been levied *to pay the judgment of plaintiff* in said action (the present respondent); and that petitioner should take from such collector *but one bond covering the collection of all county taxes.*

Several other actions of exactly similar kind were brought at the same time with the action of the respondent herein; and in each of them the same character of judgment was entered, which was affirmed by the United States Circuit Court of Appeals; and a petition for a writ of certiorari is being presented by this petitioner in each of said causes, contemporaneously with the presentation of this petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner, as Judge of the Taylor County Court, is in this position:

Under the opinion of the Court of Appeals of Kentucky, the highest court of that State, he has the right to appoint a collector of taxes levied by Taylor County for ordinary governmental purposes, such as keeping up the court house and the jail, etc., and to appoint a different collector to collect taxes levied to pay any judgments that may exist against the county. And if he has difficulty, and thereby delay ensues, in finding a person who will accept the office of collector for *all taxes,*

and give a bond to collect them, it is the *right and duty* of petitioner, as such County Judge, to proceed promptly to appoint a collector for the ordinary county taxes, to pay the current expenses of the county government, so that the laws may be executed, and to proceed further to appoint a collector to collect taxes for the purpose of paying judgments against the county, just as soon as a person can be found who will accept the appointment and execute the proper bond.

But, under the judgment of the United States District Court, affirmed by the Circuit Court of Appeals, petitioner, as County Judge of Taylor County, is forbidden to take the course above stated, and is commanded, in effect, not to appoint any collector to collect any county taxes, for any purpose, until a suitable person can be found who will undertake to collect not only the usual taxes levied by the county for current expenses, but also those necessary to pay the judgments against the county entered in the United States District Court, and who can, and will, give a proper bond for the collection of all such taxes.

And petitioner has in fact experienced great difficulty in finding, and in fact thus far has not been able to find, any one who will accept the office of county tax collector, and give the bond required by the judgments of the said court; though he has diligently and in good faith tried to find one. And the result of this is that, pending this delay, no taxes of any kind can be collected for the administration of the affairs of the county; although, under the law as construed by the Court of Appeals of Ken-

tucky, petitioner, as County Judge, has the right, and it is his duty, to proceed promptly to cause the taxes necessary for the current administration of the county government to be collected, without waiting until some one can be found who will undertake to collect the taxes and execute the bonds required by said judgments of the District Court.

Petitioner submits, therefore, that a writ of certiorari should be granted by this, the Supreme Court of the United States, to said United States Circuit Court of Appeals for the Sixth Circuit, so as to bring before the Supreme Court the said cause, and the said controversy, and thus enable it to settle the law upon a matter which is absolutely vital to the administration of the law, and the exercise of the functions of government, in Taylor County, Kentucky, and as to which there is a conflict between the decisions of the Court of Appeals of Kentucky and the United States Circuit Court of Appeals, both of which are the law to this petitioner, as an official of the State of Kentucky, and of the County of Taylor.

WHEREFORE, W. T. Hendrickson, Judge of the County Court of Taylor County, prays that a writ of certiorari may be issued to the United States Circuit Court of Appeals for the Sixth Circuit, commanding it to transmit to this court the record in the cause aforesaid, that it may be reviewed as provided by law.

HELM BRUCE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

The legislative and judicial history of the subject of this controversy, stated as briefly as we can present it, is as follows:

The present statute governing the appointment of tax collectors, being Kentucky Statutes, §4131, which is quoted in full in the petition for certiorari, is the result of an amendment made in 1906 to a pre-existing statute. The amendment consisted simply of the addition of the last three lines as they are now found in the statute as quoted in the petition, to-wit:

> "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

In a case, the facts of which arose prior to the amendment of 1906, though it was decided by the Court of Appeals of Kentucky subsequent to that date, to-wit, in the case of Commonwealth v. Wade, 126 Ky. 791, the Court of Appeals of Kentucky held that while a County Court had the power to appoint one collector for State taxes, and a separate collector for county taxes, it had no power to divide the county taxes and to appoint one collector to collect the regular revenue of the county and another collector to collect special assessments necessary to pay debts of the county (126 Ky. 799). This case was decided by the Court of Appeals of Kentucky in October, 1907, upon a state of facts which arose prior to 1906, and which

were, therefore, controlled by the statute as it existed prior to the amendment of 1906. In this Wade case, the court construed the old statute as we have just stated, and held, further, that the appointment of a special collector for the collection of any particular part of the county taxes less than the whole was *absolutely void,* for want of any authority in the County Court to make such an appointment. In that case, as appears from the opinion, Wade had been made regular collector of taxes for both State and county purposes, and had accepted the appointment and qualified for both positions by executing bonds in *January, 1902* (page 795). Subsequent to his appointment and qualification, the Fiscal Court of the county made a special levy to pay a certain obligation of the county, and at the time of making the special levy, it appointed a special collector, one Trotter, to collect the taxes thus levied; but Trotter did not qualify as special collector, and Wade did not collect the taxes, claiming that it was not his duty to collect them. As to Trotter's appointment, the court held it was absolutely void, saying:

> "The nomination of W. B. Trotter as collector by the Fiscal Court was void for want of authority to make it." (Pages 799, 800.)

And the court also held that it was the duty of Wade, under his appointment made in January, preceding the special levy, to collect the special levy, and that having failed to do so, his bondsmen were liable.

In the meantime, after the controversy had arisen, out of which the Wade case grew, though before it was de-

cided by the Court of Appeals of Kentucky, the statute was amended, as we have heretofore stated.

The next step was the decision of the case of Tucker v. Hubbert, 196 Fed. 849, by the United States Circuit Court of Appeals for the Sixth Circuit, which was decided *June 4, 1912*, which was subsequent to the amendment, and upon facts which arose subsequent to the amendment. And in that case the Circuit Court of Appeals, adopting the construction of the *original statute* which the Court of Appeals of Kentucky had placed upon it in the Wade case, held further that the amendment of 1906 *had not changed the law as to the County Court's power of appointment*, and that it still had the power to appoint *only one collector of county taxes* and must require of him just *one bond to cover all county taxes*. As just stated, this case of Tucker v. Hubbert was decided June 4, 1912.

A few months subsequent to the decision of Tucker v. Hubbert by the United States Circuit Court of Appeals, the Court of Appeals of Kentucky, on November 14, 1912, decided the case of Commonwealth v. Moody, 150 Ky. 571. And in this case the Kentucky Court held that the amendment of 1906 *had changed the law as to the County Court's power of appointment*, and that the very purpose of the amendment was to change the statute, as construed in the Wade case. It is true the Kentucky Court made a mistake in dates, saying, in substance, that the amendment of 1906 was doubtless passed to meet the Wade case, whereas the amendment was really passed before the Wade case was decided; the court failing to

note the fact that, while the Wade case dealt with the law as it existed prior to the amendment, and said nothing about the amendment, it was in fact decided after the amendment was passed. This, however, does not alter the fact, but rather emphasizes the fact, that the Court of Appeals in the Moody case held, that the effect of the amendment of 1906 was to change the law as construed in the Wade case. In the Moody case the court used this language:

> "The case of Commonwealth v. Wade's Administrator, *supra,* construed Section 4131 and other sections of the statutes *as they existed prior to the amendment of Section 4131 in 1906,* as Wade's delinquencies referred to in that opinion, occurred before the amendment, and the statute *was then construed as allowing* BUT ONE COLLECTOR *of county or district revenue.* It was further held in that opinion that it was not necessary to certify the taxes to be collected, to the collector; that the collector took the place of the sheriff and was responsible for the collection of all taxes levied during his term of office. As stated, in view of this construction of the statute, *the Legislature authorized the appointment of special collectors* and provided specifically that such collector should give bond for and collect *only such revenue as the order of appointment directed him to collect.* It is not for this court to pass upon the propriety or impropriety of this legislation. The legislative department of the State had a right to enact it" (page 574).

This language is unmistakable in its meaning. It contrasts the law before the amendment and after the amendment, and the *power of the County Court* before the amendment and after the amendment, saying that be-

fore the amendment the County Court had the power to appoint *but one collector of county taxes,* but that by the amendment the Legislature authorized the appointment "of *special collectors* and provided specifically that such collector should give bond for and collect only such revenue as the order of appointment directed him to collect."

And the court, having construed the statute in this way, then took up the argument, which had been urged upon it, that the statute, as thus construed, is unconstitutional, as being in violation of the contract between the county and its creditors, and held that the statute as thus construed by it is not unconstitutional, but is a valid exercise of power.

Promptly after the delivering of this opinion, the Commonwealth (which was suing for the benefit of a creditor of Taylor County) filed in that case what it called a "Petition for Rehearing and Modification of Opinion," in which it called to the attention of the court the opinion of the United States Circuit Court of Appeals in Tucker v. Hubbert, 196 Fed., *supra,* wherein that court had reached a different conclusion as to the meaning and effect of the amendment of 1906; and the petition urged the Court of Appeals of Kentucky to adopt that construction of the statute as amended, suggesting that the *judgment* of the court exonerating Moody and his sureties might be allowed to stand, on the ground that the particular order appointing him collector for that year excluded the taxes to pay the judgment in question, but urging that the *opinion construing the statute* be changed to conform to that of the Circuit Court of Appeals in

Tucker v. Hubbert, so that *next year*, when it should come time to appoint a collector, a mandamus might be obtained in the State Court, as had been granted in the Federal Court, commanding the County Court to appoint *but one collector for all county taxes* and to require of him *but one bond to cover all.* And the petition concludes with an earnest appeal

> "to give to these many creditors of Taylor County *living in Kentucky* the same opportunity to have their debts collected by a future regular collector of county revenue, *as the Federal courts have given to non-residents of Kentucky.*"

The court, however, overruled the petition and refused to change either its judgment or its opinion, thus leaving them to stand as the law of Kentucky, controlling upon all courts of Kentucky.

Next in point of time came the decision of the United States Circuit Court of Appeals in Graham v. Quinlan, 207 Fed. 268, which went up from *Green County*, Ky., and was decided June 30, 1913, a few months after the Moody case. In Graham v. Quinlan, the Circuit Court of Appeals followed its preceding opinion in Tucker v. Hubbert, *supra*, briefly referring to the Moody case, and saying of it:

> "We are *not convinced* that the case of Commonwealth v. Wade's Adm'r, 126 Ky. 791, which held that only one collector could be appointed, etc., was intended to be modified by the decision in Commonwealth v. Moody, 150 Ky. 571";

and briefly stating again the court's own reason for still thinking that its original construction of the amendment of 1906, as adopted in its former opinion in Tucker v. Hubbert, was correct.

Then came the present case, decided by the Circuit Court of Appeals, in which in a "*per curiam*" opinion it simply followed its two preceding decisions in Tucker v. Hubbert, and in Graham v. Quinlan.

It is difficult to say, with certainty, how the court, in the present case, means to dispose of the Moody case. It is not clear whether the court means to say that the Court of Appeals of Kentucky, in the Moody case, did not construe the statute as we have heretofore said it did, or whether it means to say that it did construe it in that way, but that it was a dictum, and that it declines to follow the same for that reason.

On this subject we may remark that the Court of Appeals itself certainly did not consider that its language in construing the statute was a dictum, because it not only construed it, as shown by the language we have quoted above, but then took up the question of the constitutionality of the statute, as thus construed, and decided that the statute, as thus construed, was constitutional, which surely the court would never have done, if it had not felt called on to do so, as that court has always followed the practice, which every court follows, of not deciding a constitutional question unless required so to do. And furthermore, as we have seen, it refused to modify the opinion, when urged to do so in order that the law and the remedies applicable to residents of Ken-

tucky might be the same in the courts of Kentucky as those applicable to non-residents of Kentucky in the Federal courts.

And we may further remark that in the case at bar, the United States *District* Court followed the *construction* of the statute given by the Court of Appeals of Kentucky in the Moody case, but, feeling itself not bound by the views of the Kentucky Court on the *constitutionality* of the statute, held that the statute, as construed by the court in the Moody case, was unconstitutional, as being an attempt to violate the obligation of a contract (Rec., 13, 15).

And while it may not be necessary at the present time to make any elaborate argument as to the true construction of the statute, to determine whether the Court of Appeals of Kentucky is correct, or the United States Circuit Court of Appeals is correct, yet we can not refrain from calling attention to the fact that, while the amendment may have been awkwardly worded to accomplish the change in the law which the Court of Appeals of Kentucky thought it did accomplish, yet from a reading of the language of the amendment, it is very difficult to escape the conviction that the Legislature of Kentucky did mean by this amendment to do exactly what the Court of Appeals of Kentucky in the Moody case says it did. Under the pre-existing statute, as construed in the Wade case, there was no power at all in the County Court to appoint a collector for *less than the whole* of the county taxes. It was bound to appoint a collector for the whole taxes, or for none at all. And, as ex-

pressly held in the Wade case, an order appointing a collector for less than the whole was absolutely void for want of power in the County Court to make it. But this amendment manifestly means to recognize the power of the County Court to appoint a collector for less than the whole of the county taxes; for it expressly says that "such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him." This plainly implies that such collector *shall be required* to give bond for, and *shall have the power to collect*, and shall collect, *such taxes as the order specifies, whatever they may be.* But, if the County Court still, as theretofore, has no power to make an order appointing him to collect less than the whole, the order would be void, and would vest no right or power in him, and he would be a trespasser if he undertook to collect taxes under such an order. And the fact that the statute does not so treat him, but treats him as authorized to collect, to whatever extent the order specifies taxes to be collected by him, shows that the amendment was intended to *recognize the power of the County Court to make such an order;* for if the order is valid, and the appointee has the right to act under it, the County Court *has the power to make it.* And if the court *has the power* to make it, then, manifestly, no court, Federal, or otherwise, has any right to control the discretion of the County Court as to whether it will make such an order, or not.

Think of the extraordinary situation in which the construction now adopted for this statute places a county.

The regular collector is appointed in January of each year. The order appointing him must specify the particular taxes he is to collect. He is authorized to collect no others, and his bond covers none other. Suppose during the next month, February, the court house burns down, or a great freshet washes away all the bridges in the county, or some other public misfortune comes. A special tax may be *levied* to meet the emergency, but, under the present construction of the statute, there is no power to appoint a *collector* to *collect it*, for this would be less than the whole of the taxes for that year, and there is no power, they say, to make such an appointment. The regular collector, as we have seen, would not be required to collect it, nor would his bond cover it, because not specified in the order appointing him. There would be absolutely no means, therefore, by which the county could collect a dollar to meet such a situation until possibly nearly a year after the emergency had arisen.

The statutes of Kentucky were never intended to have any such effect, and the Court of Appeals of the State has so held.

We suppose it is not necessary, and possibly would not be appropriate, at the present time, to discuss the *constitutionality* of the statute as construed by the Court of Appeals of Kentucky. We feel very confident that we can uphold it. The amendment of 1906 made absolutely no change in any right or remedy theretofore existing, except that instead of all county taxes being collected, as theretofore, by one collector, the amendment allowed the County Court to appoint two, or more, col-

lectors; the duty to appoint, and the duty to collect, and the means afforded for forcing collection, remaining absolutely unchanged. But, without entering into the detail of the argument at present, we simply submit that, as the Court of Appeals of Kentucky has held the statute to be constitutional, the question is surely worthy of argument before the statute is condemned.

We therefore ask that the writ of certiorari be granted, and the cause brought here, that the important question involved may be settled by this the only tribunal that can settle it.

HELM BRUCE,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
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No. 9[illegible]427

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, - - Petitioner,

versus

LEWIS APPERSON, - - - - - - Respondent.

Brief for Respondent on Petition for Writ of Certiorari.

A. E. RICHARDS,
B. OVERTON HARRIS,
Counsel for Respondent.

Westerfield-Bouvy Co., Incorporated, Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, - *Petitioner,*

versus

LEWIS APPERSON, - - - - - - - - *Respondent.*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

The litigation which the Petitioner seeks to have reviewed in this court involves the tedious efforts of certain holders of bonds executed by Taylor County to collect judgments rendered upon those bonds. There is no question as to the validity of the bonds themselves, or of the judgments rendered upon them. It is the efforts of the judgment creditor—the Respondent—to collect the judgment that presents the issue raised.

The District Court for the Western District of Kentucky granted a Mandamus directing the Fiscal Court of Taylor County to levy a tax upon the taxable property in the county sufficient to pay the judgment involved in this case. No complaint is made against that part of the order and the levy was duly made. But the order went further and directed the County Judge—the proper

official—that when he next appoint a collector to collect any county tax (except school taxes expressly excepted) levied for any purpose he should embrace in the order of appointment a direction to the appointee to collect the tax levied to pay Respondent's judgment and any other item of the regular county tax levy. And the County Judge was further commanded to take from the collector but one single bond to cover the collection of the levy made to pay both Respondent's judgment and any item of any other levy made by the Fiscal Court for any other purpose. The importance and efficacy of this provision is readily apparent. If it were omitted and the collector allowed to discriminate between various items of the tax levy only those items devoted to the payment of regular county obligations (*e. g.*, county salaries) would be collected and Respondent would be left with an uncollectible tax levy and an unenforceable judgment.

Whether or not the District Court was justified in forbidding a separate collection of separate items of the county levy depends upon the construction of Section 4131, Kentucky Statutes (Carroll's 1915 Edition). That sections reads as follows:

> "Sec. 4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the County Court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the va-

> cancy of the office of sheriff; and in the event the County Court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall within ten days after their appointment, execute bond as required of the sheriff, to be approved by the County Court, and if the bond be not executed within said time the appointment of another collector may in like manner be made and qualified; but such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

The last phrase quoted above was added in 1906 to the previously enacted statute, and it is this phrase which is the bone of contention now.

The section quoted has been construed twice by the Court of Appeals of Kentucky; first, in Commonwealth, *ex rel.*, v. Wade's Administrator, 126 Ky. 791, and again in Commonwealth v. Moody, 150 Ky. 571. It has also been construed twice by the Circuit Court of Appeals for the Sixth Circuit, first in Tucker v. Hubbert, 196 Federal, 849, and again in Graham v. Quinlan, 207 Federal 268.

In Wade's case the Court of Appeals decided that the appointment of a special collector for the special levy made to pay the judgment was void and it remained the duty of the regular collector to collect all taxes for that year "whether State or county, whether regular or special." This decision was based upon facts arising prior to the 1906 amendment to Section 4131, but in Moody's case, *supra*, decided upon facts arising subsequent to the 1906 amendment, it was decided that in view of that

amendment the collector was obligated only for those items of the county levy specifically set out in his order of appointment. The only question before the court was whether Moody was obligated under his order of appointment to collect an item not set out in that order. That was his sole defense, and it was solely upon the determination of that question that the case was decided. Counsel for Petitioner would read into the language of the Moody opinion a decision of another question, viz., the authority of the County Court to appoint separate collectors for separate items of the county tax levy. That question was not before the Kentucky Court for decision. and any such dictum even if hatched from counsel's critical analysis of the language used in the opinion was not binding upon the Circuit Court of Appeals and discloses no diversity of construction of Section 4131.

The Circuit Court of Appeals in Tucker's case, *supra*, referring to the effect of the 1906 amendment upon the opinion in Wade's case decided by the Kentucky Court upon facts arising prior to that amendment said (page 859): "We think the only effect of the statutory amendment relied on to escape that decision is to relieve the collector and his bondsmen from liability for uncollected taxes not covered by the order of appointment."

Moody's case had not then been decided. But in Graham v. Quinlan, 207 Fed. Rep. 268, 272, the Court of Appeals said:

> "We are not convinced that the case of Commonwealth v. Wade's Admr., 126 Ky. 791, 104 S. W. 965, which held that only one collector could be appointed,

etc., was intended to be modified by the decision in Commonwealth v. Moody, 150 Ky. 571, 150 S. W. 680. The amendment of Section 4131, passed upon in the Moody case, does not purport to change the portion of that section which provides for the appointment of collectors."

Petitioner has not shown his right to the Writ of *Certiorari.* As decided in Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 258, the jurisdiction of this court to review judgments of the Circuit Court of Appeals by *certiorari* "is a jurisdiction to be exercised sparingly and only (1) in cases of peculiar gravity and general importance, or (2) in order to secure uniformity of decision." We would insist that this record presents neither a case of peculiar gravity and importance, nor is uniformity of the decisions below lacking. The Circuit Court of Appeals has twice construed the Kentucky statute in a similar manner, and that construction does no violence to the construction placed upon it by the Court of Appeals of Kentucky. We ask that the petition for *certiorari* be denied.

Respectfully submitted,

A. E. Richards,

W. Overton Harris,

Counsel for Respondent.

Office Supreme Court, U. S.
FILED
APR 9 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

No. [redacted] 427

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY,
Plaintiff in Error,

versus

LEWIS APPERSON, - - - - *Defendant in Error.*

MOTION.

Plaintiff in error, W. T. Hendrickson, moves the court to advance this cause for hearing, and as ground of such motion says:

By reason of the judgment of the United States District Court in this cause, and of the inability of plaintiff in error to find any one who will accept the office of tax collector under an order pursuant to that judgment, and to give a bond as required by that judgment, no county taxes have been collected in Taylor County since the entry of that judgment on May 29, 1916, and conditions in the county are becoming worse every day. It is therefore of great importance to the county and its citizens, and can be no disadvantage to the defendant in error herein, that this cause should be speedily decided.

In support of this motion reference is made to an affidavit made by plaintiff in error when the cause was pending in the United States Circuit Court of Appeals, found on page 28 of the record. The conditions described in that affidavit still exist.

HELM BRUCE,
Counsel for Plaintiff in Error.

Notice of the foregoing motion,
to be made Monday, April 9,
1917, is accepted:

W. OVERTON HARRIS,
Counsel for Defendant in Error.

FILED
SEP 10 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

Nos. 427, 428, 429, 430, 431.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KY., - - - - - - - - - Petitioner,

vs.

LEWIS APPERSON, - - - - - - - - - Respondent,

SAME, - - - - - - - - - - - - - - Petitioner,

vs.

ELIZABETH CREAGER, - - - - - - - Respondent,

SAME, - - - - - - - - - - - - - - Petitioner,

vs.

HUGH S. GARDNER, - - - - - - - - Respondent,

SAME, - - - - - - - - - - - - - - Petitioner,

vs.

MILDRED A. HOCKER, - - - - - - - Respondent,

SAME, - - - - - - - - - - - - - - Petitioner,

vs.

STERLING LAND & INVESTMENT COMPANY, - - - - - - - - - Respondent.

BRIEF FOR PETITIONERS.

HELM BRUCE,
Attorney for Petitioners.

ABEL HARDING,
Of Counsel.

August 24, 1917.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

Nos. 427, 428, 429, 430, 431.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KY., - - *Petitioner,*

vs.

LEWIS APPERSON, - - - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

ELIZABETH CREAGER, - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

HUGH S. GARDNER, - - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

MILDRED A. HOCKER, - - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

STERLING LAND & INVESTMENT CO., - - *Respondent.*

BRIEF FOR PETITIONERS.

The above five cases have been brought to this court by writs of certiorari directed to the United States Circuit Court of Appeals for the Sixth Circuit, to which the cases had been brought by writs of

error from the United States District Court for the Western District of Kentucky. The five cases involve exactly the same questions, raised and decided at the same time and in the same way.

For convenience when reference is made to a page of the record, we shall refer to the record in the first case named, to-wit, the Apperson case.

The principal question is as to whether a County Court of Kentucky, proceeding under Section 4131 of the Kentucky Statutes to appoint a collector of county taxes, is mandatorily required by law to appoint one collector for all county taxes of every kind and to take from him but one bond for the collection of all taxes, or whether, on the other hand, the court has a discretion under which it may appoint, if it thinks advisable, different collectors for the collection of different classes of county taxes, as, for example, one collector to collect taxes levied for the ordinary county governmental purposes, and another collector to collect taxes levied for the purpose of paying the debts of the county; and can require from each collector, thus appointed, a bond simply for the collection of the taxes specified in his order of appointment.

And the question also arises as to the effect of the fact that the bonds constituting the bases of the judgments involved herein were issued under a particular statute which prescribes a remedy in case of failure to pay them.

In each of the cases the plaintiff, having theretofore recovered a money judgment against Taylor County, and a return of "no property found," filed a petition for a mandamus against the members of the Fiscal Court of the county, commanding them to make a levy of taxes upon the taxable property in the county, sufficient to pay the judgment, and praying specifically for a mandamus against the county judge (W. T. Hendrickson), in effect commanding him to appoint the same collector to collect the taxes levied to pay the judgment therein involved that shall be appointed to collect taxes for other purposes levied by the Fiscal Court, and to require this collector to give but one bond to cover the collection of all of these taxes, of every kind (Rec., 3, 4.).

In each case an answer was filed in which, after setting forth the terms of the levy which had been made by the Fiscal Court for the year 1916, defendants further pleaded as follows:

> "Defendants further say that under the statutes of Kentucky, as construed by the Court of Appeals of Kentucky, the County Court of Taylor County has a discretion as to whether it will appoint one person to collect all moneys due the State and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes,

such as the payments of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond. And they respectfully submit that this Honorable Court can not, by its judgment, control the aforesaid discretion of the County Court of Taylor County, given it by the statutes of Kentucky as construed by the Court of Appeals of Kentucky." (Rec., 6.)

Subsequently in each case an amended and a second amended answer were filed, raising certain questions as to a road tax; but we have concluded, for sake of simplicity, not to press that question in this court.

A demurrer was filed by the plaintiff to the answer as amended, and was sustained by the court, a written opinion being filed (Rec., 13).

Defendants thereupon declined to plead further, and a judgment was entered in each case practically in accordance with the prayer of the petition, except that it directed the Fiscal Court to levy only one-third of the amount necessary to pay the claim of each plaintiff for each of three successive years, instead of levying an amount sufficient to pay the entire claim in one year; and except further that the court excluded *school taxes* from the taxes which the County Court was required to embrace in the order directed; this exception being on account of the fact that the Court of Appeals of Kentucky has lately held that school taxes, though levied and collected

by a county, are State taxes, and not county taxes (Rec., 17).

On writs of error the Circuit Court of Appeals for the Sixth Circuit affirmed the judgments of the District Court, delivering a *per curiam* opinion simply adhering to two former opinions by that court, to-wit, *Tucker* v. *Hubbert,* 196 Fed. 849 and *Graham* v. *Quinlan,* 207 Fed. 268, and placing a construction upon a statute of Kentucky which we insist is in direct conflict with an opinion of the Court of Appeals of Kentucky construing the same statute in *Commonwealth* v. *Moody,* 150 Ky. 571.

After the decision by the Circuit Court of Appeals, writs of *certiorari* were allowed by this court and thus the cases were brought here; and as they involve precisely the same questions they will be argued together.

ASSIGNMENT OF ERRORS.

The formal assignment of errors will be found on page 19 of the record, but they may be briefly stated, as they have in fact been already stated in substance at the opening of this brief, as follows:

1. That the court erred in requiring the judge of the County Court of Taylor County, when he should appoint a collector of any tax levied by the Fiscal Court, except school taxes, to embrace in the order of appointment that the collector should be required to collect the tax levied to pay plaintiff's judgment, and to require of the collector but one bond

for the collection of all taxes levied by the Fiscal Court of whatever kind.

ARGUMENT.

Discretion of the County Court.

Of course if the County Court has a discretion as to whether it will appoint one collector under one bond for the collection of all taxes levied by the Fiscal Court of every kind, or whether, on the other hand, it will appoint more than one collector and direct one to collect certain taxes and another to collect other taxes, requiring of each a bond to cover the taxes named in his order of appointment, no court, Federal or State, can control that discretion. This proposition, we assume, will not be disputed.

Furthermore, if the Court of Appeals of Kentucky has construed the statute of Kentucky on this subject as giving the County Court such a discretion, the Federal courts will accept that construction of the State statute as binding, though they will not accept as binding the decision of the Court of Appeals of Kentucky upon a question as to whether or not the statute as thus construed conflicts with the Federal Constitution. These principles also we assume will not be disputed.

The section of the statute governing the matter, as the same is now found (independent of the provisions of the Refunding Act of 1878, which will be hereafter referred to), is the result of an amend-

ment of a pre-existing statute, and there was a decision by the Court of Appeals as to the meaning of the original statute, as there has likewise been one as to the meaning of the amended statute.

Prior to 1906, Section 4131 of the Kentucky Statutes (as will be found in the 1903 edition), was as follows:

> "Section 4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the County Court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the County Court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required by the sheriff, to be approved by the County Court, and if the bond be not executed within said time the appointment of another collector may in like manner be made and qualified."

In a case arising under the law as contained in the statute as we have just quoted it (Commonwealth of Kentucky v. Wade's Admr., 126 Ky. 791), the Court of Appeals of Kentucky held that while a County Court had the power to appoint one collector for State taxes and a separate collector for county

taxes, it had no power to appoint one collector to collect the regular revenue of the county and another collector to collect special assessments by the county (126 Ky. 799).

In 1906, however, the section as quoted above was amended by adding to it the following words:

> "But such collector shall only be required to give bond for and collect *such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him.*" (See Section 4131, Kentucky Statutes, Edition 1909 or 1915.)

And after the statute had been thus amended, another case arose under it, in the same county (Taylor), in which the previous case of Commonwealth v. Wade's Admr. had arisen. We refer now to Commonwealth v. Moody, 150 Ky. 571. This case was exactly similar in character to the Wade case, except that the Wade case was decided upon facts which arose before the amendment was passed, and the Moody case was decided upon facts which arose after the amendment was passed. Each was a case of a suit against sureties on the bond of a collector for failing to collect and account for taxes levied to pay a debt of the county. In the Wade case the court held the sureties liable, and this case was relied upon as conclusive authority in the Moody case. But upon that subject the Court of Appeals of Kentucky said:

"If the law had remained as it was when the case of the Commonwealth v. Wade's Administrator, *supra,* was decided, it could not be seriously contended that appellees are not liable to appellants for the levy; but the indications are, that in view of that opinion, the Legislature amended Section 4131 of the statutes so as to make it read as follows:" (The court here quotes the complete statute *as amended,* italicizing the words added by the amendment, and then says):

"This amendment expressly limits the duties and powers of a *special collector** to the performance of those things 'mentioned or provided' for in the order appointing him, therefore, Moody was only authorized to collect the levies made in the order appointing him collector, and it did not include the forty-two cents levy on each one hundred dollars worth of taxable property in that county for the purposes of paying Wade's administrator his debt.

"The case of Commonwealth v. Wade's Administrator, *supra,* construed Section 4131 and other sections of the statutes as they existed prior to the amendment of Section 4131 in 1906, as Wade's delinquencies referred to in that opinion, occurred before the amendment, and the statute was *then construed as allowing but one collector of county or district revenue.* It was further held in that opinion that it was not necessary to certify the taxes to be collected, to the collector; that the collector took the place of the sheriff and was responsible for the collection of all taxes levied during his term of office. As stated, in view of this construction of the statute, *the Legislature authorized the appointment of special collectors* and provided specially that such collector should give bond for and collect only such revenue *as the order of appointment*

* All italics in this brief are ours, unless otherwise stated.

directed him to collect. It is not for this court to pass upon the propriety or impropriety of this legislation. The legislative department of the State had a right to enact it." (150 Ky., pages 573, 575.)

Without discussing at present whether this view of the amendment was right or wrong, we submit that the Court of Appeals unquestionably decided that the amendment changed the pre-existing law, and, whereas the pre-existing law, as construed in the Wade case, had authorized the appointment of "but one collector," the amendment authorized the appointment of more than one collector, or, as the court calls them, *"special collectors,"* each to collect *such taxes as should be directed in the order of appointment.*

It is true that the Court of Appeals was mistaken in saying that the amendment was passed in view of the opinion in the Wade case, because it does appear that the amendment was passed in March, 1906, whereas the Wade case was not decided until October, 1907; the court being led into this error by observing that in the Wade case the statute there quoted was the statute as it existed prior to the amendment, and failing to observe that the opinion had been delivered after the amendment was passed; though it doubtless is true that the amendment was passed on account of the *question that had been raised* on the subject in litigation, but before its decision by the Court of Appeals. This error, however, does not militate against the fact that the Court of

Appeals in the Moody case expressly stated that the purpose of the amendment was to change the statute construed in the Wade case. And the important point is, not whether the opinion in the Moody case was right or wrong in saying that the amendment was passed to meet the views of the Court of Appeals in the Wade case, but that the court in the Moody case held that the amendment did have the effect of changing the pre-existing law in the respect in which the Wade case had construed it. And that the court, in the Moody case, did so hold, seems to us to be shown beyond controversy by the language we have quoted. In fact nothing could show this more clearly than the very mistake of fact which the Court of Appeals made in the Moody case; for it thought that the amendment had been passed, *in view of that opinion,* and *for the very purpose of meeting it.* And, as said before, while the court was mistaken in that, it is nevertheless unquestionably true that the court held that the amendment had the effect of changing the law on the point involved in the Wade case.

Counsel argued in the courts below that the amendment of 1906 did not change the statute as to what collectors should be appointed, but only changed the statute as to the *liability* of any collector appointed—in other words, that the amendment did not act on the court's power of appointment, but only on the liability of the court's appointee.

Without considering at present what would have been the proper construction of the amendment, if

the Court of Appeals of Kentucky had not construed it, we submit that that court has construed it and has unquestionably construed the amendment as acting, not merely upon the question of liability of a collector when appointed, but as acting upon the power of the court to appoint one or more collectors. It seems to us the language of the court on this point is unmistakable. And we again call this court's attention to the language of the Court of Appeals in the Moody case on this exact point. It says:

> "The case of Commonwealth v. Wade's Admr., *supra,* construed §4131 and other sections of the statutes as they existed prior to the amendment of §4131 in 1906, as Wade's delinquencies referred to in that opinion occurred before the amendment, and the statute was then construed as allowing *but one collector of county or district revenue.* It was further held in that opinion that it was not necessary to certify the taxes to be collected, to the collector; that the collector took the place of the sheriff and was responsible for the collection of all taxes levied during his term of office. As stated, in view of this construction of the statute, *the Leglislature authorized the appointment of special collectors* and provided specially that such collector should give bond for and collect only such revenue as the order of appointment directed him to collect. It is not for this court to pass upon the propriety or impropriety of this legislation. The legislative department of the State had a right to enact it."

The words which we have here italicized show that the court was contrasting the County Court's *power*

of appointment under the old statute with its *power of appointment* under the amended statute; the court holding that whereas, prior to the amendment, "the statute was then construed as allowing but *one collector* of county or district revenue," yet by the amendment *"the Legislature authorized the appointment of special collectors."* Whether the court was right or wrong in this construction of the statute, we are not now arguing. But that it did hold that the amendment acted upon the court's *power of appointment*—not on the mere liability of an appointee when appointed—seems to us beyond the range of legitimate controversy.

Counsel have sought to make it appear that the main fight in the case arising before the amendment (the Wade case) was over the point as to whether or not it was necessary that certain taxes be *certified* to the collector in order to hold him liable for failure to collect them, and that the amendment to the statute was intended to cover only that point, and that the Court of Appeals of Kentucky, in the succeeding case (the Moody case) meant only to decide that this was the point covered by the amendment. We have just shown by the quotation from the opinion in the Moody case that this is not true of that opinion. But furthermore if the court will read the opinion in the Wade case, it will see that the great fight in that case was over the question of whether the statute, as then existing, authorized the appointment of only one collector of county taxes or of special

collectors. Almost the entire opinion is devoted to that point, and while it is true that the defendant in that case did make the further point that the taxes had not been certified to him, yet the court disposed of that defense in the briefest manner, devoting not over a dozen lines to it, and saying simply that the statute did not require any such certification (126 Ky. 801).

Furthermore, that the Court of Appeals in the Moody case did decide that the amendment had changed the County Court's power of appointment and had given it the power to appoint special collectors of county taxes, designating in each order of appointment what that appointee should collect, whereas formerly it had had the power only to appoint one collector to collect all taxes, is shown by the fact that the Court of Appeals, after placing this construction upon the statute, then takes up and considers and decides the question of the *constitutionality* of the amendment as thus construed. Opposing counsel now say that the constitutional question would have existed if the court had simply construed the amendment as requiring the County Court to certify to its single collector the taxes to be collected by him and making him liable only for the taxes thus certified. But manifestly there could not have been any possible doubt of the constitutionality of an amendment to a statute simply providing that it should be the duty of the County Court to certify to its collector the taxes to be collected by him, instead of requiring

him to take notice of all taxes devied. No creditor of the county could possibly have been injured by such a provision; for if the County Court, under such an amendment, had failed to certify to its collector any taxes levied for the purpose of paying the creditor's debt, it could have been compelled so to do by mandamus. And we can not conceive that anyone could have contended in good faith that such a statute was unconstitutional. And the constitutional question, which the court in the Moody case took up and considered and decided, was the very constitutional question which is now raised in the case at bar, to-wit, the constitutionality of the amendment construed as authorizing the County Court to appoint separate collectors for different classes of county taxes.

Again, it is insisted that if the Court of Appeals in the Moody case construed the amendment of 1906 as authorizing the appointment of special collectors for different classes of county taxes, then it was a *dictum,* because, it is argued, the order of appointment in the Moody case did in fact appoint Moody only as a *special collector* for certain taxes therein specified, which specification did not embrace the particular taxes for which he was sought to be made liable; and it is argued that it was only necessary for the court to decide that, as Moody had been in fact appointed and authorized to collect only certain specified taxes, and not the taxes in question, and as he had given bond with surety only for the collection

of the specified taxes, he and his sureties could not be held liable for any others. Manifestly, however, the Court of Appeals felt and believed that it was not sufficient or proper simply to announce a conclusion that Moody and his sureties were not liable on the simple ground that his order of appointment did not cover the taxes in question, but that the construction of the amended statute, which was relied upon in the case, was properly involved and that it was proper and necessary for the court to determine what change that amendment had made in the pre-existing statute as to the appointment and liability of collectors of county taxes.

We doubt not that it is frequently a question of some doubt on the part of a court as to just the ground upon which it will base its decision where there may possibly be more than one ground which might justify a particular conclusion. And in this case the Court of Appeals chose to define exactly the status of Moody as collector under this amended statute, deciding that the amendment had changed the pre-existing law as set forth in the Wade case and that whereas, under the old statute, the County Court was authorized to appoint only one collector to collect all the taxes, yet under the amendment it was authorized to appoint special collectors and to specify in the order of appointment what each one should collect, he being liable then only for the taxes thus specified, and that Moody, therefore, had been properly appointed only such special collector and

that his order of appointment, within the legitimate discretion of the County Court, had only specified certain particular taxes, and that he could not be held liable for any others. It seems to us that it was perfectly proper and legitimate for the court thus to reason the matter out in defining Moody's status and liability; and at the same time, the court in this way informed the fiscal authorities as to what were their duties and responsibilities under the law.

We do not believe, therefore, that the opinion in the Moody case as to the effect of the amendment of 1906 upon the County Court's power of appointment was a dictum. And manifestly the Court of Appeals did not so consider it, for otherwise it would never have entered upon a discussion and made a decision upon the constitutionality of the statute as thus construed; for there is no court which more carefully observes the familiar principle that a court will never decide a constitutional question unless necessary.

We submit, therefore, that the Court of Appeals of Kentucky in the Moody case, whether right or wrong in its construction, did unquestionably construe the amendment of 1906 as changing the law from what it had previously been, as construed in the Wade case, and did unquestionably hold that whereas, under the statute as construed in the Wade case, there could be *but one collector,* whose duty it should be to collect all the county taxes under one bond, yet the amendment had changed the law in that

respect and authorized the appointment of *special collectors,* each to collect the taxes specifically mentioned in his special order of appointment.

And we submit furthermore that the construction which the Court of Appeals placed upon this amendment in the Moody case is the only rational construction that can be placed upon it, although the language of the amendment may be awkward. In considering the construction of a statute, whether an original or an amended statute, it is legitimate to consider what would be the result of a particular construction contended for; because if that result would be an absurdity, or is such that it can not be believed that the Legislature could have intended such a thing, then it is reasonable to suppose that the suggested construction is not a proper one. Let us then consider what would be the result of construing this amendment as still making it the duty of the County Court to appoint *but one collector* of all county taxes, whether for general or special purposes, whether embraced in the general levy at the beginning of the year or in special levies at other times, but as requiring the County Court in its order of appointment of such collector to *specify what taxes he should collect* and as requiring the County Court to take from him only *a bond to collect such specified taxes and no others.* Suppose this to be the law under that amendment, when properly construed, and let us see how it would work in actual practice.

The general levy of taxes by the county is usually made at the beginning of the year, to-wit, in January, and the collector is then appointed and gives his bond. We will, therefore, suppose in the given case that during the month of January, the County Court has made a levy of taxes for all purposes which it then believes necessary, and has appointed a collector and has specified in his order of appointment all of the taxes which have thus been levied, and that he has given a bond for the collection of the same. Then suppose there comes an unforeseen, and unforeseeable, emergency, requiring the raising of additional money by taxation to meet the same. Suppose, for example, a spring freshet comes along in February or March and washes away some of the important bridges along the county roads, thus rendering travel over them impossible. Or suppose a conflagration destroys the court house or the jail of the county. These misfortunes have not been anticipated and the taxes levied in the regular county levy are, of course, not sufficient to meet and provide for these unforeseen contingencies. Yet it is necessary to rebuild these bridges or to rebuild the court house or the jail, and to do so immediately and to provide for the payment of their cost. Ordinarily the course would be to have an estimate made of the cost of construction, to levy a special tax to meet it, and have a collector of taxes, whether general or special, proceed to collect the taxes under the special levy. But under the construction placed upon this statute by our op-

ponents such a thing would be impossible. There would be no power to appoint a special collector to collect these special taxes, because it is insisted that the County Court has no power to appoint a special collector, and has only power to appoint one collector to collect all taxes of every kind. Having no power to appoint a special collector, the authorities would turn to the general collector appointed in January; but here it would be met by the fact that the order appointing him collector in January did not specify, and of course could not have specified, these special taxes levied in February or March, and therefore neither he nor the sureties on his bond would be liable for their collection, nor would he have any authority to collect the same. It would, therefore, be impossible to collect them during that year.

Under the statute as it existed prior to the amendment, there would have been no trouble about such a situation, because, as held in the Wade case, a general order made at the first of the year appointing a collector of county taxes, made it the duty of the collector thus appointed to collect *all* county taxes levied during that year, whether general or special, whether levied in January or levied later in the year; and the sureties on his bond were liable for his failure to collect any county taxes of any character whenever levied. Nor would there be any trouble under the amendment, *as we construe it;* for the court would simply appoint a special collector for these taxes covered by the special levy. But under the amend-

ment, according to the construction placed upon it by our opponents, it is still the duty of the County Court to appoint but one collector, and it has no power to appoint more than one collector, yet it is required to specify exactly what taxes he shall collect, and he has no power to collect any others and is, therefore, not responsible for the collection of any others. And as he must necessarily be appointed, and usually is appointed, at the beginning of the year, therefore, as the County Court is not gifted with omniscience or foreknowledge, it can not possibly know in January what taxes it may become necessary to levy and collect during the course of the year, and therefore, can not specify them. From all of which it results that if any emergency occurs calling for the expenditure of money not anticipated in January of that year, there is no possible way to provide for it until the beginning of another year. It is impossible to believe that the Legislature of Kentucky ever intended that any such meaning should be given to the amendment of the statute regulating the appointment and duties of collectors of taxes.

Again, if this amendment means only what our opponents say it means, that is, if it means only to provide that a collector of taxes shall have power to collect, and shall be liable for the collection of, only such taxes as are mentioned in the order of the County Court appointing him, then the amendment was useless. Such would have been true under the

original statute. For example, suppose a person had been appointed to collect all *county* taxes. No one would ever have thought of contending that he had power to collect, or was responsible for the collection of, *State* taxes. Counsel said in the court below that the Court of Appeals of Kentucky in the Wade case had held that a collector could be held responsible for taxes not mentioned in the order of appointment. But this statement is manifestly incorrect. In the Wade case, the collector was appointed to collect the county taxes, and the court simply held that this meant *all* county taxes, and that he was responsible for the collection of them, because they were covered by his appointment and his bond. But the court, of course, did not mean to hold, and did not hold, that a collector could be required to collect taxes which the order appointing him did not authorize him to collect. We repeat, therefore, that if this amendment simply means that a collector can not be held responsible for failure to collect taxes which he has not been authorized to collect by the order appointing him, then the statute is perfectly useless, for such would have been the law without it.

Again, if since the amendment the County Court still has only the power to appoint *one collector for all the county taxes,* then manifestly an attempt to appoint a collector for *less than all*—only a part—of the taxes, would be without authority of law and void. And the Court of Appeals so held in the Wade case. There a general collector (Wade) had been appointed

in January. Subsequently, in April, a special levy was made under an order of mandamus, and one Trotter was appointed as special collector, to collect the special levy. And in speaking of this appointment, the court said: "The nomination of W. B. Trotter as collector by the Fiscal Court was void *for want of authority to make it.*" (126 Ky. 799, 800.) If the court has no authority under the statute to appoint a collector for *only part* of the county taxes, then, of course, it could confer no authority upon him, and he would be a trespasser if, under such an order, he should attempt to collect any taxes. But this amendment to the statute *manifestly recognizes the validity of such an appointment;* for it recognizes the power of the collector to collect the taxes *specified in the order of appointment,* whatever they may be, whether the whole or a part of the county taxes, and recognizes his duty to give bond for and collect the same. But if the collector thus appointed to collect only a part of the taxes has power to collect them, and can be required to give bond for them, it must be because his order of appointment is valid; and if the order of appointment is valid, it must be because the court making the order had power and authority to make it.

The amendment is not as clear as it might be, but that is true of many statutes, which the court is called upon to construe, and possibly is particularly true of amendments, where an attempt is made to make a law by taking an old statute and simply adding to

or subtracting from its language. But we submit that no reasonable construction can be given to this amendment under consideration other than that which the Court of Appeals has given it, to-wit, that whereas under the old law the County Court could appoint but "one collector," yet under the amendment, it can appoint "special collectors" and require of each of them a bond for collecting such taxes only as may be specified in the order of appointment.

If the construction, absurd as it seems to us, be adopted that under this amended statute the County Court still has the power to appoint *only one collector,* but that if the court does, notwithstanding the lack of authority, nevertheless appoint a collector for only part of the taxes, this shall be deemed a valid appointment, and the collector be vested with authority to collect only part of the taxes, the result would probably be to bring about a race between the County Court and the creditors of the county, if the County Court, as charged by counsel for the creditors, should be attempting to defeat them. For under such construction, if the County Court should succeed in making the appointment of a collector for only part of the taxes before the creditors could reach the court with a mandamus to make the order of appointment cover all the taxes, the court's order of appointment of a partial collector would be valid, and he could go out and collect the taxes specified in his order of appointment and pay no attention to the taxes levied for the benefit of the creditors of

the county; whereas on the other hand, if the creditors could "beat him to it," to use a slang phrase, and could get an order of mandamus before the County Court had succeeded in making the appointment, the creditors would carry the day. It is hardly to be believed that such a result was ever intended by the Legislature of Kentucky.

It may be added in conclusion upon this point that the Federal District Court in the case at bar, differing in this respect from the Circuit Court of Appeals, adopted the opinion of the Court of Appeals of Kentucky in the Moody case as a binding construction of the statute, but was of the opinion that the statute thus construed was an impairment of the obligation of the contract between the county and its creditors and, therefore, void. And to this question we now address ourselves.

Constitutionality of the 1906 Amendment (as Construed by the Court of Appeals of Kentucky and by the District Court).

But it is insisted, and the District Court held, that the amendment of 1906, as heretofore quoted, as construed by the Court of Appeals of Kentucky and by the District Court, impairs the obligation of the contract between Taylor County and the plaintiffs as its creditors. The Court of Appeals considered the same question and held that the amendment did not impair the obligation of the contract.

The contract itself between the county of Taylor and its bondholders has not been varied in the slightest degree. The property, subject to taxation for the purpose of raising funds to pay the indebtedness created by the contract, has not been diminished or changed in any respect whatever. The right and duty to levy a tax upon this property for the purpose of paying the indebtedness have not been taken away or limited. The right and duty to appoint a collector of such taxes, with full power to collect the same by distraint, or any other process heretofore existing, has not been taken away or limited. In other words, the contract remains the same as it always was; the property subject to payment of the indebtedness remains the same as heretofore; the power and duty to levy a tax upon this property and to collect the tax out of this property by the process prescribed by law for collecting taxes in Kentucky remains just the same as they have always been since the contract was made. The only change is that, whereas formerly the taxes levied to raise funds for ordinary county purposes, and the taxes to raise funds to pay the county's indebtedness, were required to be collected by the same collector, now, by the amended law, the County Court has a discretion to appoint one man to collect taxes levied for ordinary county purposes, and a different man to collect taxes levied for the payment of the county debt. The only result of this, of which the creditors complain, is, not that the property subject to payment of their debt

has been diminished or changed, and not that the means of subjecting this property to the payment of this debt has been changed, but that a kind of club has been taken out of their hands. The argument is, that formerly the creditor could say to the county, and to the people of the county: "If you do not pay my debt you shall not run the county government, you shall not maintain your court house, or your jail, and the administration of justice, and the maintenance of order in the county shall cease."

The closest analogy to the present case which we have been able to find among the cases decided by this court is in that line of cases in which the court has held that the taking away by statute of the creditor's right to have the person of his debtor imprisoned, until the debt shall be paid, does not impair the obligation of the contract, although it modifies the remedy.

Sturges v. Crowninshield, 4 Wheat. 122.
Mason v. Haile, 12 Wheat. 370.
Beers v. Haughton, 9 Pet. 329.
Vial v. Penniman, 103 U. S. 717.

The analogy between the two classes of cases is very close, and it seems to us that the principle underlying them is exactly the same. In the imprisonment for debt cases the situation has been this: The contract between the debtor and the creditor was left absolutely unchanged. The property of the debtor, subject to the payment of the debt, was left absolutely unchanged. The right to sue and recover judgment, and

collect the debt by execution was left absolutely unchanged. But whereas the creditor, at the time the contract was made, could hold, as it were, a club over the head of the debtor and say to him, in effect: "Property or no property, if you do not pay my debt, I will send you to jail and leave those dependent upon you to starve," yet, under the new condition, after the imprisonment statute was repealed, this club was taken away from him, and he was compelled to take his chance on finding property of the debtor out of which to make the debt. So in the present case, the debt is left just the same, and the property subject to it is left just the same, and the means of collection is left just the same, and the only change that has been made is that the creditor no longer has a certain means of *personal duress* which he formerly had, whereby he could say to the county: "If you do not pay my debt you must let your court house and jails fall down, and your roads and bridges become unsafe for public travel, and your poor be left unprovided for." The threat of imprisonment hanging over a debtor, and the threat of anarchy hanging over a county may be supposed each to have some effect in making the debtor exert unusual effort to pay, but in each case it is only a collateral effect, only a species of personal duress; and as the one may be taken away, being to that extent a modification of the remedy existing at the time the debt was created, so may the other. We can see no *principle* according to which one may be permitted and the other denied.

And in this connection we may further say that, while it may be true that sometimes a debtor was induced by a threat of imprisonment to raise money and pay his debt, whereas, without the threat, he would not have done so, yet it often happened that the money was not raised, and the only satisfaction the creditor had was to see his debtor behind the prison bars, and his children begging on the street. And that condition finds an analogy also in the present case. This attempt to paralyze the government of the counties unless they pay the claims of their creditors, has not had the effect of producing payment. The learned district judge in his opinion in these cases, in referring to the situation as existing prior to the amendment of 1906, when only one collector could be appointed under Section 4131, says, "It afforded a good remedy for the creditors who held the county's bonds." But there is nothing in the record, nor, as we believe, outside the record, to support this statement, if it means that thereby taxes were collected with which to pay the bonded debt of the county. The amendment in question was not passed until 1906, and even since the amendment, the Circuit Court of Appeals, as early as June 4, 1912, in the case of Tucker v. Hubbert, 196 Fed. 849, upheld an order requiring the county judge to appoint but one collector under but one bond, and yet, so far as we know, no taxes have ever been collected which were levied to pay the bonded debt, either of Taylor County, which is involved in the present case (and

was also involved in the case of Tucker v. Hubbert, *supra*), or of Green County, which was involved in the case of Graham v. Quinlan, 207 Fed. 268, decided June 30, 1913, simply because it has not been possible to get any one to undertake to collect these taxes.

In other words, the threat of imprisonment for debt, and the threat of the paralysis of county government, are both mere species of personal duress as against the debtor, and in fact experience has shown, in both cases, that the duress does not produce the payment of the debt.

The first case which came before this court involving the validity of a statute repealing the law authorizing imprisonment for debt was the case of Sturges v. Crowninshield, 4 Wheat. 122, in which the opinion was delivered by Chief Justice Marshall. That case involved the validity of a New York statute of 1811, being "An Act for the benefit of insolvent debtors and their creditors." That was a State bankruptcy statute, which undertook to discharge, under the conditions named therein, both the person and the property of the debtor—in fact undertook to discharge the debt. So far as the statute undertook to discharge the debt, the court held that it impaired the obligation of the contract, and was void. But so far as it undertook to discharge the person of the debtor, the court held that the statute was valid. On that subject the court said:

> "The distinction between the obligation of a contract, and the remedy given by the Legisla-

> ture to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or *may be allowed as a means of inducing him to perform it.* But the State may refuse to inflict this punishment, or *may withhold this means, and leave the contract in full force.* Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." (Pages 200, 201.)

Without commenting upon the intervening cases heretofore cited, in which the court upheld the same principle, we may refer to Penniman's case, 103 U. S. 714, decided as late as 1880, which involved this same question of the validity of a statute repealing a pre-existing law authorizing imprisonment for debt, which had been in effect when the debt therein involved was created. And the court, citing and quoting from the pre-existing cases on that subject, again held that such a statute did not impair the obligation of the contract, concluding with the following statement of a general principle:

> "The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the Legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right." (Page 720.)

And it was held that a statute repealing the right to imprison for debt was valid within this principle; although it is undoubtedly true, and must be conceded, that the right to imprison the debtor for failure to pay the debt does sometimes induce the debtor, by reason of his fear of the imprisonment to raise money and pay the debt, when, otherwise, he would not have done so. And the statutes authorizing imprisonment for debt have been passed with the belief that this would be the effect, as sometimes it is, though sometimes it is not.

Another case in which the court has laid down certain principles on this subject of *altering the remedy* is the case of Antoni v. Greenhow, 107 U. S. 769, one of the Virginia bond cases. It appears from that case that the law of Virginia, at the time the bonds therein involved were issued, authorized the acceptance of coupons on those bonds in payment of taxes, and under the law, as then existing, if these coupons were not accepted, the holder thereof could compel their acceptance by mandamus. Subsequent to the issue of the bonds, a statute was passed which provided that in case the coupons were tendered, the officer to whom they were tendered, should receive them and give a receipt for same "for the purpose of identification and verification," but should, at the same time, require the taxpayer to *pay his taxes in money,* and in case of refusal thus to pay, the taxes should be collected as other delinquent taxes. The collecting officer was given no discretion in the mat-

ter, he might have no doubt about the validity of the coupons, yet he was absolutely prohibited from receiving them other than in the way and for the purpose indicated, and it was made his duty in every case to insist upon the payment of taxes in money, and if such payment was not made, then to enforce same as in case of other delinquent taxes. If the taxpayer followed the process pointed out in the statute, surrendered his coupons to the tax collector, but paid the amount thereof in money, he was authorized to file a petition against the Commonwealth in the County Court in which he should allege these facts, whereupon the statute provided that an issue should be made on behalf of the Commonwealth as to the genuineness and legality of the coupons—this being required in every case, whether there was any reason to doubt the particular coupons or not—and this issue was required to be *tried by a jury,* either party being given the right of appeal from the judgment of the County Court to the Circuit Court and then from the judgment of the Circuit Court to the Court of Appeals of Virginia. Then if after this long process of litigation was completed it should finally be determined that the coupons were valid, the court was required to certify this fact to the treasurer, who was thereupon required to "refund the money before then paid for his taxes by the taxpayer *out of the first money in the treasury,* in preference to all other claims." If there were no money in the treasury, then the taxpayer had simply to wait until there

should be some, whenever that might be. If the taxpayer sought a mandamus to compel any collector to receive his coupons, it was made the duty of the collector to make return to the court, saying that he was ready to receive the coupons "as soon as they have been legally ascertained to be genuine," and thereupon it was the duty of the court before whom the application for mandamus might be made to require the petitioner to pay the taxes in money, and upon the filing of a receipt for the taxes, it was the duty of the court to require the coupons to be filed and then, not to try the question of the validity of the coupons in *that court,* but to send them *to the County Court,* there to start upon the process of litigation above described; thus requiring the procedure to go through the County Court, the Circuit Court and the Court of Appeals; the issues of fact to be tried by a jury.

In a dissenting opinion by Mr. Justice Harlan, in speaking of the change from the pre-existing law as made by the law in question, he says:

> "Under the contract and the laws in force when it was made, the collector was not bound to resist an application for a mandamus, and it is not to be presumed that he would do so, unless he doubted the genuineness of the coupon tendered in payment of taxes. If, however, he did so, he became liable to pay costs when the taxpayer succeeded; while under the Act of January 14, 1882, all discretion is taken from the collector and, without liability to pay costs in any contingency, he is required, although he may

know the coupon to be genuine and legally receivable for taxes, to decline receiving it until the taxpayer, having first paid his taxes in money, shall, to the satisfaction of twelve jurymen, prove it to be genuine." (Page 807.)

Yet this court, in an opinion by Chief Justice Waite, to which there were but two dissents (to-wit by Mr. Justice Field and Mr. Justice Harlan) upheld the validity of the act prescribing the procedure above described, and in course of the opinion the court said:

"It can not be denied that, as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge and enforcement.' Walker v. Whitehead, 16 Wall. 314, 317. But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the Constitution in respect to the legislative power of the States over the obligation of contracts was suggested by Chief Justice Marshall in Sturges v. Crowninshield, 4 Wheat. 122, and has been uniformly acted on since." (Citing several cases.) "As was very properly said by Mr. Justice Swayne in Von Hoffman v. City of Quincy, 4 Wall. 535, 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations

of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.' In all such cases the question becomes, therefore, *one of reasonableness,* and *of that the Leglislature is primarily the judge.* Jackson v. Lamphire, 3 Pet. 280; Terry v. Anderson, 95 U. S. 628. We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed. *If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account.* Munn v. Illinois, 94 U. S. 113. We have nothing to do with the motives of the Legislature, if what they did is within the scope of their powers under the Constitution."

Now apply these principles to the case at bar. Suppose the Legislature of Kentucky observed, as a matter of fact, that which we understand is a fact, viz., that the provision of the statute allowing simply one collector, who was required to give but one bond for the collection of all taxes levied by the county, whether for ordinary county governmental purposes or in payment of debts, did not have the effect of raising the money by taxation with which to pay the bonds, but only had the effect of obstructing the county government, because of the great difficulty and delay in finding one willing to undertake to collect the taxes levied for the payment of the debts, or to give bond with surety for the collection of same;

so that while no good was accomplished for the benefit of bondholders, the course of the administration of the law, and the maintenance of order, in other words, the operations of government, were greatly impeded, and therefore great public harm done; we say, suppose the Legislature ascertained that to be the fact, then would it not have been justified in providing for a separation of these two things, so that one man could be appointed to collect the taxes necessary for the ordinary county purposes and a different man be appointed to collect the taxes for the payment of the debts, leaving the law unchanged as to the duty of the County Court to appoint a collector for the taxes to pay the debts, and leaving the law likewise unchanged as to the power of that man to force the payment of taxes, and leaving unchanged the remedies of the creditors for compelling the execution of the laws? If the Legislature found that such were the facts, was not the amendment of 1906, authorizing the separation of the collections a *reasonable* act of legislation? And if it be true, in the language of the court, in Antoni v. Greenhow, that the question is "one of reasonableness," of which "the Legislature is primarily the judge," and if it be true that "if a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account," then is not the present law a valid one, measured by these principles? We submit that it is.

The case of Bronson v. Kinzie, 1 How. 311, an opinion by Chief Justice Taney, is a leading one on this subject, and one which is very often cited. In that case the court said:

> "And, although a new remedy may be deemed *less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult,* yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution." (Page 316.)

And in this connection, suggested by the first sentence in the quotation just made, we may call the court's attention to the fact that it has often been held that the mere fact that a certain means of collection of a debt does not promptly produce satisfaction of it, does not show that it is not an adequate remedy in the eye of the law. This principle has often been applied in the very class of cases which we are now considering, to-wit, cases involving the collection of taxes to pay debts of municipalities. Thus in Rees v. City of Watertown, 19 Wall. 107, there had been a mandamus against the county officers to levy and collect a tax to pay certain debts, and this process had been repeated a number of times, but the officers resigned their offices and the taxes were not collected. Accordingly, the creditors

brought suit in equity, asking the aid of a court of equity to collect the money with which to pay the debts of the city, on the theory that there was no adequate remedy at law for the collection of same, as had been demonstrated by experience. But the court held that the equitable remedy could not be granted, and among other reasons for this conclusion, it gave the following:

> "We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the Legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. * * * The legal remedy is adequate and complete, and time and the law must perfect its execution." (Pages 124, 125.)

It may be true, and it is true, that plaintiffs have not been able to secure the payment of their debts. And it is further true that they were not able to se-

cure this before the amendment now under consideration was passed by the Legislature of Kentucky. But in the theory of the law the remedy which these bondholders have is an adequate one, and is the one which the law has provided.

Quite a striking case involving a change of remedy is Morley v. Lake Shore R'y Co., 146 U. S. 162. At the time a certain contract was made the legal rate of interest in New York was 7%, and there was a statute providing that a judgment for money should bear interest, the statute being as follows:

> "A judgment for a sum of money, rendered in a court of record, or not of record, or a judgment rendered in a court of record directing the payment of money, bears interest from the time when it is entered."

Morley obtained a judgment for money against the Lake Shore Railroad Co., which judgment, according to its terms, bore interest from the date of its entry. The amount of interest was not expressly stated, but, as said before, the legal rate of interest both at the time of the entry of the judgment and at the time of making the contract was 7%. Subsequent to the entry of this judgment a statute was passed which changed the legal rate of interest from 7% to 6%. Subsequent to the passage of this statute, defendant tendered payment of the judgment with interest at 7% up to the effective date of the last-mentioned statute, and with interest at 6% from that date to the day of payment. The creditor insisted

that this was not a full payment, and that the statute was an impairment of the obligation of the contract, he insisting that at the time the contract was made the law provided in effect that judgments for money should bear interest at 7%, and that this law continued in fact to the date of the judgment, and that this was a part of his contract, and could not be taken from it. This court, however, held otherwise, holding that the allowance of interest on a judgment was in the nature of statutory damages and could be changed at will by the Legislature of the State, saying:

> "His right was to collect such damages as the State, in its discretion, provided should be paid by defendants who should fail to promptly pay judgments which should be entered against them, and such right has not been destroyed or interfered with by legislation. The discretion exercised by the Legislature in prescribing what, if any, damages shall be paid by way of compensation for delay in the payment of judgments is based on reasons of public policy, and is altogether outside the sphere of private contracts." (Page 171.)

It is proper to say that the court did not treat this case as one involving the right to change the remedy, although counsel for plaintiff earnestly insisted that this was the effect, arguing of course that by the law of New York which prescribed the remedy for failure to pay a debt, the plaintiff was entitled to recover a judgment for the debt, and to have interest on that judgment at the rate of 7% per annum; and

that a change in this law was in effect a change in the contract. But this court refused to so hold. And so if it be said in the present case that, at the time the debt in question was created, there was no provision of the law providing for the appointment of different collectors to collect different kinds of taxes levied by a county, and that that law has since been changed, so that the governmental taxes are collected separately from the taxes to pay debts, yet this condition of the law at the time the contract was made was not a part of the contract. And under the law, as changed, the plaintiffs still have a right to have taxes collected by a tax collector out of the same property as before, and by the same means of forcible collection as before. And the only power they have lost is a certain power growing out of a fear of anarchy or of disruption of county government on the part of the county if the debt is not paid, akin to the fear of a debtor threatened with imprisonment if the debt is not paid. *And the creditor has no vested right to the influence of such a fear as a part of his contract.*

Refunding Act of 1878.

Thus far we have considered these cases solely on the ground upon which plaintiffs pitched them in the District Court, to-wit, on the ground that the construction and legality of §4131 of the Kentucky Statutes, as amended by the Act of 1906, considered without reference to any other statute, were the only questions to be considered in determining the cases in hand. But there is another statute which must be considered in this connection, to-wit, the Refunding Act of 1878, under which the bonds which constitute the bases of plaintiffs' claims, were issued. That was an act entitled "An Act for the benefit of Taylor County, empowering it to compromise its debts, issue bonds, and levy and collect taxes to pay the same," approved March 18, 1878 (First Kentucky Session Acts of 1878, page 554). That act authorized Taylor County to compromise all bonds, coupons, judgments or other indebtedness of the county "growing out of the issue of any bonds or coupons heretofore issued by said county"; and provided for the issue of refunding bonds, fixing the amount thereof and the rate at which former bonds might be taken up by the substitution of the new bonds, etc. It also provided for the levy and collection of taxes sufficient to pay the bonds issued under the new act and for the cancellation of the old bonds. And under that act the bonds, which are the foundation of the present cases, were issued. Subsequently there was an amendment

to the Act of 1878, which amendment was passed in 1882, which provided a different remedy for the enforcement of these refunding bonds; but this court, in the case of Hubbert v. Campbellsville Lumber Co., 191 U. S. 70 (affirming Campbellsville Lumber Co. v. Hubbert, 112 Fed. 718, opinion by Judge Lurton), decided that, as the bonds which were in fact issued did not mention the amending act nor refer to the remedy therein provided for, as the amendment provided they might do, therefore the remedy prescribed by the *amended* act was not available to the bondholder, the court saying:

> "There is nothing in the nature of things nor in the terms of the two acts which prevents the parties, the county and the recipient of the bonds, *from contracting for solely the remedies provided in the original act*" (page 75).

The original Act of 1878 to which we have referred, being the act under which the bonds were issued, created a right and prescribed the remedy by which that right should be enforced; and such being the case, it seems to us hardly necessary to cite authority to support the proposition that the remedy thus provided is exclusive. And we submit that the remedy provided by this act, in case the county authorities should fail to take proper steps to levy and collect taxes sufficient to pay the bonds, was by application to the Circuit Court to make an order levying a tax sufficient to pay the bonds or interest thereon, based on the last preceding assessment, and appoint-

ing a *special collector to collect that tax.* And if this be true, then such remedy is exclusive and shows certainly that the bondholders, when they took their bonds, did not rely upon a right to force the county authorities to appoint a single collector for the collection of all taxes levied by the county of every character and to require such collector to give but a single bond to cover all county taxes; and shows that the enactment of a subsequent statute, authorizing the appointment by the County Court of a special collector to collect the taxes necessary to pay these bonds, was not in violation of any contract right of the bondholders.

The statute of 1878 is not as clear as might be desired, but reading §§2, 4, 5 and 6 of that act together, being the only sections which relate to the levy and collection of taxes, and which are quoted in full in an appendix to this brief, we understand the act to mean that it should be the duty of the sheriff of Taylor County to collect all taxes levied by the County Court under that act, and, in the event of the sheriff's failure to execute a bond to secure such collection, then it should be the duty of the County Court to declare his office vacant and to appoint a tax collector and take bond from him (Sec. 5). Whether the tax collector thus to be appointed by the County Court was to be a tax collector for all taxes levied by the county, or just for the taxes provided for by this act, is not clear; but it does seem entirely clear, from Section 2 of the act, that in case of the failure of

the county authorities to levy and collect the taxes necessary to pay these bonds, then any bondholder might proceed in the *Circuit Court* to have a levy made of a tax sufficient to pay the bonds and coupons issued under that act and to appoint a *special collector* to collect just the taxes thus levied; the language of the act in this connection being:

> "And any *bona fide* holder or owner of any such bond or coupon, issued and delivered as aforesaid, on obtaining a judgment, in any court of competent jurisdiction, against the said county, shall, if the county refuse, for thirty days after demand, to levy and proceed in good faith to have collected a tax sufficient to pay any such judgment, interest and costs, be entitled, on application to the Circuit Court, or, in vacation, to the Circuit Judge of the Seventh Judicial District, after having notice thereof served on the judge of said county, to have an order made, based on the last preceding assessment, levying a tax and *appointing a collector, whose duty it shall be to collect from the taxpayers of Taylor County sufficient to pay off such judgment, interest, and costs, and the cost of collecting the same; and the collector so appointed shall have all the power given by law to the collectors of State revenue and county levies, and be liable in like manner.*"

It is manifest from this language that the collector here to be appointed was to be a collector who should simply collect from the taxpayers "sufficient to pay off such judgment, interest, and costs, and the cost of collecting the same"; and the fact that he was not to be the same as the regular collector of

State revenue or county levies is shown by the fact that the statute provides that he is to have *the same power that such collectors have.*

We, therefore, submit that when the bonds now in question were issued, it was contracted between the State and the bondholders that if the county authorities should not proceed properly to levy and collect taxes sufficient to satisfy the obligations of the bonds, then the remedy of the bondholder should be to have a *special tax collector* appointed by the Circuit Court to collect sufficient taxes for this purpose; and he certainly is not in a position to insist that a statute, authorizing the *County Court* to provide *special collectors,* is in violation of his contract rights.

To avoid confusion and possible misapprehension, it should be explained that the Wade case, heretofore referred to (Commonwealth v. Wade, 126 Ky. 791), in which the Court of Appeals held that there was no authority for the appointment of a special collector, was not a case based upon railroad bonds issued under the Refunding Act of 1878. It was a case involving the enforcement of a debt owing to a bank for money borrowed by the county under the authority of an altogether different act, as appears from the opinion of the court in the Wade case (126 Ky. 802), and also from the opinion of the court in the preceding case of Bank of Columbia v. Taylor County, 112 Ky. 243, which involved the same debt. Of course, therefore, no question could have arisen

or been decided in the Wade case as to the effect of the Act of 1878, under which *the bonds* were issued, in giving a remedy to "any *bona fide* holder or owner *of any such bond or coupon,*" referring to the bonds and coupons issued under the Act of 1878.

CONCLUSION.

We ask that the judgments of the District Court, and Circuit Court of Appeals, be reversed, in so far as they undertake to control the discretion, which we believe exists in the County Court, either to appoint one collector for all county taxes, or, on the other hand, to appoint one collector for taxes for general county purposes, and another collector to collect taxes to pay the debts of the county, or according to such other classification of county taxes as to that court may seem wise.

Respectfully submitted,

HELM BRUCE,
Attorney for Plaintiffs in Error.

ABEL HARDING,
Of Counsel.

August 24, 1917.

APPENDIX.

Sections from Refunding Act of 1878— 1 Acts 1878, page 554.

§2. That the faith and credit of the county of Taylor be, and the same is hereby, pledged to carry out, in good faith, any and all contracts made by it for the issue, purchase, compromise and redemption of any and all bonds and coupons issued under the first section of this act; and any and all bonds and coupons issued and delivered under this act shall be valid and binding on the parties thereto; and any *bona fide* holder or owner of any such bond or coupon, issued and delivered as aforesaid, on obtaining a judgment, in any court of competent jurisdiction, against the said county, shall, if the county refuse, for thirty days after demand, to levy and proceed in good faith to have collected a tax sufficient to pay any such judgment, interest and costs, be entitled, on application to the Circuit Court, or, in vacation, to the circuit judge of the Seventh Judicial District, after having notice thereof served on the judge of said county, to have an order made, based on the last preceding assessment, levying a tax and appointing a collector, whose duty it shall be to collect from the taxpayers of Taylor County sufficient to pay off such judgment, interest and cost and the cost of collecting the same; and the collector so appointed shall have all the power given by law to the collectors of State revenue and county levies, and be liable in like man-

ner: Provided, also, That any collector appointed under this section shall, before he proceeds to act, execute a bond, with good, solvent surety, to be approved and attested by the judge of said district, the same to be by him delivered to the Taylor County Court Clerk for safekeeping; and should the County Court, held by the county judge and justices, or by the county judge, fail, for ten days after demand in writing, to levy and proceed in good faith to collect a tax as provided in this act, then, and in that event, it is hereby made the duty of the Circuit Court, or judge thereof in vacation, being informed of such failure by any *bona fide* bondholder or his attorney, to levy and have collected, as in case of a judgment, a tax to pay off semi-annual interest on past-due coupons of bonds issued under this act, of which application the County Court or judge thereof shall have ten days' written notice.

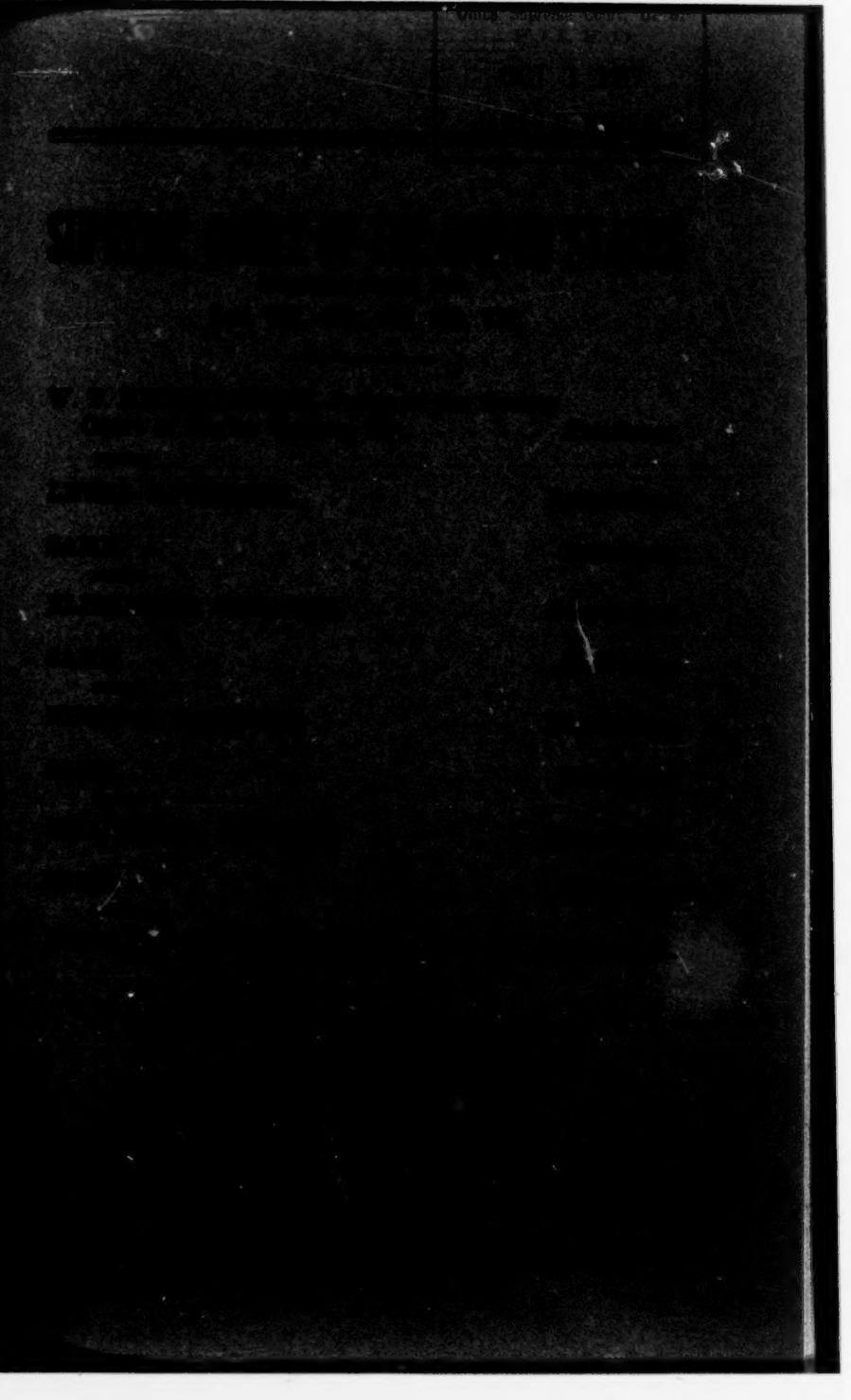
§4. That it shall be the duty of all collectors appointed under the provisions of this act to make monthly reports, under oath, to the county treasurer of Taylor County of all moneys collected by him or them; and such collectors shall at once pay over to the county treasurer the amount of all moneys collected by him, less the commissions allowed by law or order of the court or judge making the levy. And it is hereby made the duty of the treasurer of Taylor County to deposit all moneys collected under the provisions of this act, so soon as he receives the same, in some solvent bank, with a paid-up capital of not

less than $100,000, to the credit of Taylor County, which money shall be paid out by such bank only upon the check of the treasurer of Taylor County. And no such collector or treasurer shall have the right to use or loan said money, or any part thereof, for any purpose whatever, save and except as provided in this act.

§5. All such collectors shall collect the entire tax in his hands, and pay the same over to the county treasurer within six months from the time the tax-books are placed in his hands for collection. And it is hereby made the duty of the sheriff of Taylor County to collect all tax levied by the County Court under this act; and should he fail for ten days, after the levy of any such tax and notice to him, to execute bond, with good and sufficient surety, to be approved by the County Court, then it shall be the duty of said County Court to declare, by order of record, his office of tax collector forfeited. And in that case it is made the duty of the said County Court to appoint a tax collector, and take bond from him, with good and approved surety, and fix, by order, the compensation of such collector. And if any sheriff or tax collector shall fail to collect or pay over the taxes, as provided in this act, to the county treasurer, such sheriff or collector so in default shall, with his sureties on his official bond, be liable to an action, on motion on ten days' notice in the Taylor Circuit or Common Pleas courts, in which action the county of Taylor, in its own name, shall recover for any default

of the sheriff or collector the amount due the county, with interest from the time it should have been paid, the costs of the action or motion, and ten per cent damages on the amount found due and recoverable. And should the treasurer of Taylor County fail to pay over any money in his hands when ordered to do so by the Taylor County Court, he and his sureties shall be liable in like manner as is herein provided in regard to sheriffs and tax collectors; and the Taylor County Court, held by the county judge, shall have the right to require all sheriffs, tax collectors and the treasurer of Taylor County, to renew or give additional surety upon their official bonds as such officers, as often as he may think proper, so as at all times to have securities on said bonds good and solvent for any amount of money in their respective hands.

§6. That it shall be the duty of Taylor County to have an assessment, make a levy, appoint a collector, and have collected from the taxpayers of Taylor County, upon all property which is now or that may hereafter be assessed for, and subject to, State revenue purposes, including the amount given in under the equalization law, to pay the semi-annual interest or past-due coupons on all bonds issued under the provisions of this act, and also to pay off and take up the said bonds at maturity; and if the County Court shall deem it proper, it may, in addition to the tax herein provided for, levy an additional tax upon the taxable property of said county to create a sinking fund to purchase any or all bonds and coupons issued under the provisions of this act.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

Nos. 427, 428, 429, 430, 431.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, - - - - - - - - - *Petitioner,*

vs.

LEWIS APPERSON, - - - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

ELIZABETH CREAGER, - - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

HUGH S. GARDNER, - - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

MILDRED A. HOCKER, - - - - - - *Respondent,*

SAME, - - - - - - - - - - - *Petitioner,*

vs.

STERLING LAND & INVESTMENT CO., - - *Respondent.*

BRIEF FOR RESPONDENTS.

In 1878 Taylor County, Ky., had outstanding a considerable issue of bonds, which it was then refusing to pay. It was not contesting the validity of

these bonds or its liability upon them, but simply declined to pay them. By an Act of the Legislature of that year, it was authorized to issue and sell at par other bonds, the proceeds arising from the sale thereof to be used in purchasing its outstanding bonds at not exceeding fifty cents on the dollar. The Act also authorized the county to exchange these new or refunding bonds for the old bonds, the old bonds to be taken in such exchange at not exceeding fifty cents on the dollar (a portion of this Act of 1878 is found in the appendix to petitioners' brief. The first section is set out in the appendix to this brief). A large number of the old Taylor County bonds were retired in this way. The respondents became the owners of a number of the bonds that were issued under this Act to retire the old bonds. After paying the interest on these refunding bonds for some years, the county refused to make any further payments on them. They matured in October, 1907, and separate suits were instituted in the District Court by the respondents herein on the bonds held by them. The county made no defense and judgments were duly rendered for the plaintiffs in those actions. The county failing to satisfy these judgments, the respondents then instituted these actions for mandamus to require the Fiscal Court of Taylor County to levy the necessary taxes to pay the judgments, and to require the County Court (the office of sheriff being vacant) to appoint a collector of the tax so levied and to appoint the same collector for said tax that it appointed to

collect the taxes for other purposes levied by the Fiscal Court, and to make the appointment of a collector to collect all the taxes levied by said Fiscal Court by one order, and to embrace in the order of appointment of said collector a direction that he should collect both the levy made to pay the judgments and the levies made for any other purposes by the said Fiscal Court, and to take of said collector one bond for the collection of all said taxes.

The District Court granted substantially the relief asked. The petitioners did not oppose the granting of the mandamus so far as it directed the levy of the tax, nor so far as it ordered the appointment of a collector of the tax, but did object to any order requiring the County Court, when it appointed a collector of taxes, to appoint the same collector for all county taxes, including that levied in obedience to the mandamus granted, or requiring the execution of one bond for the collection of same. In other words, it is conceded that respondents are entitled to have taxes levied to pay their judgments and to have these taxes collected, but the petitioners have no intention of collecting the taxes thus ordered levied, and seek to have such a judgment rendered herein as will be ineffective and easily evaded.

At first blush it may seem of but little consequence whether one collector is appointed and required to execute bond for and collect the taxes to pay these judgments and all other county taxes, or whether separate collectors are appointed. But this is a

matter of prime importance, and upon it turns the question of whether respondents will ever be able to collect their judgments.

The plan of procedure in Taylor County, by which it hopes to make effective its repudiation of its just debts, is this: The person elected sheriff refuses (and has for years refused) to qualify; thereupon the County Court will appoint one collector of all the county levies, except that made to pay these judgments; another collector of the latter levy will then be appointed; the collector appointed to collect the ordinary county levies will execute bond and proceed with the collection of those taxes; the collector appointed to collect the levy to pay these debts will refuse to qualify; possibly another will be appointed and he will also refuse to qualify, and the County Court will say it is unable to get a collector of these special levies and the taxes to pay these debts will remain uncollected, and respondents will have judgments that can not be enforced. This is no fanciful or imaginary statement of what will take place if the judgment below is reversed. It is the *very thing counsel for petitioners is insisting they should have the right to do, and they are asking a reversal of the judgment of the lower court so they may be able to do this.* If it is finally decided by this court that Taylor County must collect the levies to pay these judgments, or not collect its ordinary county revenues, the county will soon pay off these judgments. On the other hand, if the court should hold that the county

can have separate collectors, it will proceed to collect all the taxes that it desires to collect for other purposes, and will utterly repudiate these debts, for the payment of which the credit of the county was solemnly pledged. The question presented is, therefore, a very important one to the respondents.

I.

Did the County Court Have the Authority to Appoint More than One Collector of County Taxes?

The determination of this question is dependent upon the proper construction to be given the statutes of Kentucky relative to the collection of county taxes.

The sheriff is the primary collector of taxes in Kentucky.

> "The sheriff, by virtue of his office, shall be collector of all State, county and district taxes, unless the payment thereof is, by law, especially directed to be made to some other officer."
> (Ky. Statutes, Sec. 4129.)

In case of a vacancy in the office of sheriff, the County Court may appoint a sheriff or collector. The section of the statute authorizing this appointment, prior to the Amendment of 1906, hereinafter referred to, reads as follows:

> "On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the County Court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all

> moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the County Court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the County Court, and if the bond be not executed within said time, the appointment of another collector may, in like manner, be made and qualified." (Section 4131.)

In the case of Commonwealth of Kentucky v. Wade's Admr., 126 Ky. 791, the Kentucky Court of Appeals construed that section to authorize the County Court to appoint only one collector for all county taxes, saying:

> "Observe that by the terms of Section 4129 the sheriff, by virtue of his office, shall be the collector of all State, county and district taxes, unless the payment thereof is by law specially directed to be made to some other officer. The words 'by law' do not mean an order of the Fiscal Court. They mean a statute, and therefore, where there is a sheriff in a county, it is his duty to collect all State, county and district taxes, unless by the terms of some statute the collection is to be made by some other officer. If there had been a sheriff in Taylor County, there is no doubt that it would have been his duty to collect the special assessment levied for the payment of the bank's debt. Now, by Section 4131, where there is no sheriff, a collector is

authorized to be appointed, and under the terms of the section the County Court may appoint one collector to collect the money of the State, county, or taxing districts authorized to be collected by the sheriff, or it may appoint a separate collector of the money due the State, the county, or any taxing district thereof during a vacancy in the office of sheriff. This language does not authorize the appointment of one collector to collect the regular revenue of the county and another collector to collect the special assessments as in the case in hand. The authority of appointment of collectors is limited to one collector for all taxes, whether State, county or district; or the County Court may appoint a collector alone to collect State taxes, and another for the county or district; but, when a collector is appointed to collect the county revenue, another may not be appointed to collect some special assessment."

In that case Wade had been appointed collector of State and county taxes for Taylor County. Later, under an order of mandamus from the State Court, a special levy was made to pay a certain judgment and Trotter was appointed to collect that special levy. But the Court held that the County Court could appoint only one collector of county taxes, and, by its appointment of Wade and his qualification, its power to appoint was exhausted and Trotter's appointment was void, and that Wade was responsible for the collection of all county taxes under the special levy.

Unless the law then under consideration has been changed, the lower court did not err in requiring the appointment of only one collector.

It is claimed, however, that by an Act of 1906, the statute was changed in this respect. That Act merely added to the section quoted above the following words, viz.:

> "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

This amendment does not purport to alter or change that portion of the section that provided for the appointment of collectors. It refers only to the character of the bond that shall be executed by the collector and the extent of the liability thereon. Had the Legislature intended to authorize the appointment of more than one collector of the county revenue, it would have amended or changed that portion of the section that provided for the appointment. But that portion of the law remains precisely as it was, and the section was altered only to the extent of requiring the County Court to set out in the order of appointment all taxes that are to be collected by the collector, and in permitting him, and his prospective sureties, to look to that order alone to learn the extent of his duty and undertaking. It becomes the duty of the County Court to set out in said order all the taxes levied by the Fiscal Court for all said purposes.

It is said that this amendment was passed to meet the question raised in the Wade case and to permit the appointment of different collectors of different

levies and that the Court of Appeals of Kentucky in the case of Commonwealth of Kentucky v. Moody, 150 Ky. 571, so held.

It will be noted that the amendment was passed in 1906, while the opinion in the Wade case was handed down October 23, 1907, and that the lower court in that case had exonerated the collector from liability for the special levy, so that there is nothing upon which to base the assumption that the Legislature was endeavoring to alter the law as therein contended for or held.

But if some question made in that case did cause the Legislature to act, manifestly it was not the question of how many collectors could be appointed, but the question of whether a collector was responsible for the collection of a tax that had not been certified to him. In the Wade case, the questions raised are stated as follows:

> "To this (the petition) the defendants filed an answer, which presented the following defenses: First, that the levy to pay the bank's debt was never certified to him for collection; second, that the Fiscal Court having in its order making the levy, appointed W. B. Trotter as special collector thereof, it was not the defendant's duty to collect it."

In discussing the first defense mentioned, the court said:

> "There is no provision in the statue to which our attention has been called, which authorizes generally a special certification of the county

> levy to the sheriff in order to make it collectable by him, and a careful search on our part has not led to the discovery of any such statutory requirement. It is the duty of the sheriff or collector to take notice of the levy of taxes by the Fiscal Court, and to collect and pay over or disburse it as by law required. This the collector failed to do, and by the very terms of the statute he is responsible on his bond for the default."

Evidently the Amendment of 1906 was to relieve the collector of this onerous duty of searching the records of the Fiscal Court and discovering at his peril what taxes had been levied, and also to enable his sureties to learn easily and certainly what liabilities they were assuming before they executed the bond. In plain words, the amendment provides this and nothing more. In no way does it affect the duty of the County Court to appoint only one collector, but it does plainly by inference require that court to set out in the order of appointment all taxes that had been levied by the Fiscal Court.

In the Moody case it is said:

> "Appellees claim that they are not liable for this tax levy, *because Moody had no right to collect it, as he had not been ordered to do so;** that he was only appointed as special collector for the county under the following order: 'Taylor County Court, January Term, January 27, 1911. Ordered by the court that G. A. Moody be, and he is hereby, appointed special collector of Taylor County to collect and account for as required by law the poll tax and *ad valorem* tax for

* All italics in this brief ours.

county purposes by an order made and entered by the Taylor County Fiscal Court on the 24th day of January, 1911, and which taxes were levied for the purposes and in the amounts following, viz.: "An *ad valorem* tax of twenty cents on each one hundred dollars' worth of taxable property of Taylor County poll tax of one dollar and fifty cents on each poll in said county to defray the current and necessary expenses of the county, five cents on each one hundred dollars of taxable property of said county, for roads and bridges, and twenty cents on each one hundred dollars of taxable property of said county and a poll tax of seventy-five cents on each poll in said county for common school purposes in said county."',

"It is further claimed that appellees are not liable for the levy, as Moody only executed a bond to faithfully perform his duties as special collector; that is, his duties as prescribed in the order appointing him."

It will thus be seen that the question presented in that case was whether a collector was liable for a tax not named in the order appointing him, *the statute expressly providing that he should not be.*

The court said:

"This amendment expressly limits the duties and powers of a special collector to the performance of those things 'mentioned or provided' for in the order appointing him; therefore, Moody was only authorized to collect the levies made in the order appointing him collector, and it did not include the 42 cents levy on each $100 worth of taxable property in that county for the purpose of paying Wade's administrator his debt. The case of Commonwealth v. Wade's Adminis-

trator, *supra*, construed Section 4131 and other sections of the statutes as they existed prior to the amendment of Section 4131 in 1906, as Wade's delinquencies referred to in that opinion occurred before the amendment, and the statute was then construed as allowing but one collector of county or district revenue. *It was further held in that opinion that it was not necessary to certify the taxes to be collected to the collector; that the collector took the place of the sheriff, and was responsible for the collection of all taxes levied during his term of office.* As stated, in view of this construction of the statute, the Legislature authorized the appointment of special collectors, and provided specifically that *such collector should give bond for and collect only such revenue as the order of appointment directed him to collect.* It is not for this court to pass upon the propriety or impropriety of this legislation. The legislative department of the State had a right to enact it."

It is manifest from this that the only question before the court in the Moody case was whether, since the Amendment of 1906, a collector is responsible for the collection of any taxes not set out in the order appointing him. Under the express provisions of that amendment, the court said he was not. But the court did not hold that the county judge had the power to appoint several collectors of the county revenues, nor did it hold that it was not the duty of the County Court to set out in the order of appointment of a collector all the levies that had been made. That question was not before the court there. We can readily concede, and do concede, that the statute,

as amended, requires the collector to look only to the order appointing him to determine his duty and liability; that this order is, in effect, a certification to him of what taxes he shall collect. The order is the measure of *his* duty. But that is not the measure of the duty of the county judge. It is *his* duty to appoint only one collector of county taxes, and to certify, in the order of appointment, all the taxes levied by the Fiscal Court. His failure to do this exonerates the collector from liability for the taxes not certified in the order of appointment, but this would be solely because of the failure of the county judge to perform his duty.

Counsel lay great stress upon the statement in the Moody case that the statute was construed in the Wade case "as allowing but one collector of county or district revenue," and seemingly overlooking the further statement that "it was further held in that opinion that it *was not necessary to certify the taxes to be collected to the collector; that the collector took the place of the sheriff and was responsible for the collection of all taxes levied during his term of office.*" This is followed immediately by the statement: "As stated, in view of this construction of the statute, the Legislature authorized the appointment of special collectors *and provided specially that such collector shall give bond for and collect only such revenue* as the order of appointment directed him to collect."

While the court did use the plural in the expression, "special collectors," in one place, it followed this immediately with the singular form, "and provided that *such collector* shall give bond." No doubt, the court, in using the first of these expressions, had in mind the power the Legislature had conferred on counties generally to appoint collectors. Just as we would say that the power to appoint sheriffs to fill vacancies is in the County Court, although only one sheriff could be appointed for a county. But, when it referred to the execution of the bond, the court did not say that "such collectors" or "each of said collectors" should execute bond, but that *"such collector"* shall give bond. The thought that was uppermost in the mind of the court was that the Legislature had so changed the statute that the collector was required to give bond only for the revenues set out in his order of appointment, and that for this reason his liability did not extend beyond the collection of the taxes so specified. We do not believe the court meant to pass upon any other question. As heretofore shown, the court in that case stated the questions before the court as follows:

> "Appellees claim that they are not liable for this tax levy, because Moody had no right to collect it, as he had not been ordered to do so."

And:

> "It is further claimed that appellees are not liable for the levy, as Moody only executed a bond to faithfully perform his duties as special

collector; that is his duties as prescribed in the order appointing him."

In other words, the defense was that, under the Amendment of 1906, the collector looked alone to the order appointing him to ascertain what taxes he should collect and the extent of his liability on his bond.

The fact that the court passed upon the constitutionality of the Act as construed by it does not show that the court held that numerous collectors could be appointed. Counsel in that case could have raised a constitutional objection to the statute, no matter how construed, nor upon what ground they lost. Objections for constitutional reasons have been raised to statutes much freer from grounds for such complaint than this one. The State Court seems to have thought that the construction given by it to the statute afforded no semblance of ground for such objection. Possibly that court felt, like counsel for petitioners, that the attorneys for Wade's administrator should have known better than to present so plain a question to the court; but there is no way to prevent attorneys from so doing, and no conclusion as to what the court held can be based upon a decision as to whether or not counsel were justified in raising a constitutional question in the case.

If there is any language of the court in the opinion in the Moody case that goes further than to hold that the collector was not liable for any taxes not mentioned in the order appointing him, such lan-

guage is *obiter dictum,* and not binding upon this court in construing this statute.

It will be observed that Moody was on January 27, 1911, appointed collector of certain taxes therein specified, the amounts and dates of the levies being set out in full in the order. Under the statute as amended, he was required to and did execute bond for the collection of those taxes only. The opinion of the court does not show when the levy to pay Wade's administrator was made, but an examination of the record of that case shows it was made on October 4, 1911, about eight months after Moody had executed bond. Clearly, under the express provisions of the statute, Moody was not liable for the collection of this special levy, whether the court could or could not appoint more than one collector. It was entirely unnecessary to pass upon this latter question.

If it be true, as it manifestly is, that Moody was not liable, no matter whether the County Court had the right to appoint only one collector or many collectors, the power of the County Court to appoint more than one collector was not involved in the litigation. A decision as to that "was not needful to the ascertainment of the right or title in question between the parties," and no court is bound by what that court may have said as to that, if it, in fact, said anything.

> "If the construction put by the court of a State upon one of its statutes was not a matter for judgment, if it might have been decided either

way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.

"And therefore this court and other courts organized under the common law has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." (Carroll v. The Lessees of Carroll, *et al.*, 16 Howard, 275.)

The proper construction of this statute has been before the Circuit Court of Appeals of the Sixth Circuit on three different occasions. First, in Tucker v. Hubbert, 196 Fed. Rep. 849, which was decided before the Moody case. That court said:

"It is contended that the effect of the writ will be to control the discretion of the county judge respecting the appointment of a collector. If this is true, the writ can not issue; but we are unable to follow this feature of the argument. The order is that when the county judge next appoints a collector to collect the county revenue to embrace in the order of appointment a direction to the officer to collect both the levy heretofore made to pay this judgment and the levy made or to be made for county purposes, and to exact of him but one bond to cover the collection of all the taxes. The duty is continuing and also independent of anything contained in the court's order to appoint a collector (there being no sheriff) to collect the usual county levies; and, when

that appointment is once made, the discretion of the county judge in that behalf will be exhausted. It results that the true effect of the order is to require the county judge to impose upon the collector so chosen, in addition to his duty to collect the county revenue, the duty to collect and secure the tax already levied to pay this judgment. It was held in Commonwealth v. Wade's Admr., 126 Ky. 799, 104 S. W. 967: '* * * When a collector is appointed to collect the county revenue, another may not be appointed to collect some special assessment.'

"*We think the only effect of the statutory amendment relied on to escape that decision is to relieve the collector and his bondsman from liability for uncollected taxes not covered by the order of appointment.* The decision removes all vestige of interference with the county judge's legal discretion, and reduces the matter to an exaction of a simple ministerial duty."

The question was again before that court in Graham v. Quinlan, 207 Fed. Rep. 268, decided after the Moody case, and that court said:

"We are not convinced that the case of Commonwealth v. Wade's Admr., 126 Ky. 791, 104 S. W. 965, which held that only one collector could be appointed, etc., was intended to be modified by the decision in Commonwealth v. Moody, 150 Ky. 571, 150 S. W. 680. The amendment of Section 4131 passed upon in the Moody case does not purport to change the portion of that section which provides for the appointment of collectors. The change simply provides that: 'Such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him.'

> "This could hardly have been intended, although so remarked in the opinion in the Moody case, to change the statute as it was construed in the Wade case; for the change was made March 15, 1906 (Acts, 1906, pp. 153, 248), and the Wade case was decided October 23, 1907. Moreover, the order made by the Taylor County Court and involved in the Moody case was that Moody was appointed only to collect particular taxes, that is, such as were levied by the Fiscal Court on the 24th day of January, 1911; but this did not involve the question of what taxes, nor does the amendment of Section 4131 prescribe what taxes, may be included in the order of the court appointing him."

And that court in the case at bar again took the same view of the statute. (238 Fed. Rep. 473.)

It is urged that the construction of the statute herein contended for would work great hardships upon a county, in that after its regular levy had been made and a collector appointed, the court would be unable to collect any further levies that might be made to meet any unusual and unforeseen contingency, such as the destruction of bridges, or its courthouse or jail. In the outset we might say that such things seldom happen. It is a very unusual thing for a Fiscal Court to make more than one levy in a year. Counsel is appealing for a construction of the law that would meet a situation that seldom arises. It is an old and true saying that "hard cases make shipwreck of the law," and if we had no other answer, we might do no more than say that the Legislature did not have these hard cases in mind when

this amendment was passed, and that it is a matter for the Legislature to remedy.

But the county is afforded ample means of meeting such a situation, should it ever arise.

Whenever a situation arises in which it becomes necessary for a county to levy a tax after it has made its regular levy and a collector thereof has been appointed, the Fiscal Court can rescind the order making the regular levy and then make another levy sufficient for all purposes. This power enables that court to meet the very situation presented by counsel in his brief.

In Commonwealth v. Beauchamp, 136 Ky. 227, a tax levy was made by the Taylor Fiscal Court on April 11, 1908. On August 26, 1908, Beauchamp was appointed tax collector, and on September 11th he executed bond as such collector. He proceeded with the collection of the tax, and, after he had collected about $500 of it, on October 8, 1908, the Fiscal Court entered an order setting aside the order of levy made April 11th, and directing Beauchamp to pay back the $500 to those from whom he had collected it. The Court of Appeals held that the Fiscal Court had this power and sustained its action, saying:

> "The only question which we deem it necessary to consider is the power of the Fiscal Court, at a subsequent term, to set aside and rescind the order of April 11, 1908, levying the 20 cents' tax. It is true that this court had decided that, where the county or Fiscal Court passes upon the merits of a claim and adjudge it to be valid, it has

no power at a subsequent term to reverse its actions (citing cases). The reason for this rule is that, in passing upon the validity of a claim, such court acts in a judicial capacity. But where the county or Fiscal Court does not act in a judicial capacity, as in a case of an appropriation of money to build bridges, its action may be rescinded at a subsequent term of the court. (Crittenden County Court v. Shanks, 88 Ky. 475), unless individual rights have become involved. The act of appropriating money after it has been levied and collected differs in no respect from an order levying a tax for the purpose of raising money. In each case the court does not act judicially, but rather in a legislative capacity. Furthermore, it has been held that the Legislature of the State has the right to repeal any act in which taxes have been imposed. Having a right to impose a burden, it has a right to remove it. And we see no good reason why a Fiscal Court, which is authorized by the Legislature to levy taxes for county purposes, has not the same right to repeal an order levying a tax in cases where no rights have become vested by virtue of such order."

Manifestly, if the court had the power to rescind the former levy, it had the power to make a new levy, after the former levy had been rescinded. Having these powers, the Fiscal Court could set aside the inadequate levy and make a new and adequate levy. The rescinding of the old levy would destroy the appointment of the collector, because his powers are limited to the collection of the levy specified in the order appointing him. The County Court could then appoint a collector for the new levy, and the antici-

pated trouble would disappear. Such procedure would seldom become necessary, but it is sufficient to meet the requirements of the extraordinary occasions referred to by counsel.

But what about the troubles that might arise out of the construction given the law by the petitioners? If they are correct, the County Court can appoint as many collectors as there are funds. If a levy is made of so much for roads, so much for salaries, and so much for maintaining the poor, and so much for schools, the court could appoint one collector for the State revenues and one for each of the county funds, or five collectors in all. A taxpayer would never know when he was through paying taxes, nor how to safely keep his numerous tax receipts. A county judge, with a keen political foresight, would divide such patronage up among as many as possible in order to keep up his political fences. Such a condition would be almost intolerable. Certainly no good reason can be given why more than one collector of county revenues should be appointed, and it is not to be supposed that the Legislature intended to authorize appointments that would cause such confusion among the people.

The effect of permitting the appointment of different collectors would be to enable the county to collect all taxes for ordinary county purposes and yet refuse to collect any to pay its debts. It is even suggested that this was the purpose of the Legislature in passing the Amendment of 1906. But certainly

no such purpose should be ascribed to the law-making department of the Government. It is inconceivable that a legislative body would pass an act to enable a county to defeat the payment of its honest debts. An Act should not be so construed as to bring about such a result. To construe the amendment as merely providing that the tax collector and his bondsman shall have the right to look to the order of appointment alone to ascertain what taxes have been levied and are to be collected by him, is to ascribe an honest and just motive to the legislative body; but to construe that amendment as authorizing the appointment of different collectors is to charge that body with colluding with Taylor, or some other, county in a shameful effort to defeat an honest debt. The law should not be so construed as to bring the Legislature in such disrepute, nor should it be so construed as to enable a county to defeat the judgments and orders of the courts, unless the language is so plain as to admit of no other construction.

Again, it is said that the Amendment of 1906 was useless if it meant only to provide that a collector should have power to collect, and should be liable for the collection of, only such taxes as are mentioned in the order of the County Court appointing him, that the liability of the collector was so limited before the amendment.

We do not so understand the law. In the Wade case it was held that the collector of county taxes was liable for the collection of all county taxes, whether

they were levied before or after his qualification, and without any certification of same to him, that he must at his peril ascertain what county taxes were levied during the year. The amendment changes this, and holds him responsible for only such taxes as are mentioned or provided for in the order appointing him. It would not be sufficient, under that amendment, to appoint him collector of *county* taxes. The particular levies he is to collect must be set out in the order of appointment. The order made in the Moody case, quoted *supra*, is a good illustration of how the taxes to be collected must now be described. Under the section before it was amended, the county judge had performed his duty when he entered an order appointing a collector of county taxes and the collector must collect all taxes then or thereafter levied during the year; now the county judge must go further and specify in the order of appointment what levies had been made for county purposes, and the collector has the right to look alone to that order to ascertain what those levies were, and what taxes he should collect. This is a radical change in the law.

Nor would the fact that it is the duty of the County Court to appoint one collector for all the county taxes, render void the appointment of a collector to collect less than all, nor do we understand that the Court of Appeals so held in the Wade case. The County Court has the power to appoint a collector. It is its duty to specify in the order of appointment all county taxes that are to be collected.

Yet failure upon the part of the County Court to perform this latter duty properly would not invalidate the appointment of the collector. In the Wade case the appointment of Trotter as collector was not held invalid because he was appointed to collect only a part of the levy, but because it was made by the Fiscal Court and the County Court had already appointed Wade as collector, and Wade had qualified, and was acting, as such collector. The County Court had no power to appoint another collector. Its power of appointment had been exhausted in the appointment of Wade. The Fiscal Court never had the power to appoint.

The anticipated race between the County Court and the creditor of a county to determine whether the collector could be appointed by that court to collect only a part of the taxes before the court could be required by mandamus to appoint such collector to collect all taxes would not materialize if the creditor was prompt in his application for the writ. If he were dilatory and let the county judge "beat him to it," his remedy would certainly be effective the next year, and he would not be put off indefinitely. Yet, under the construction of the statute sought by petitioners, the conditions would be much worse. The County Court would not even have to hurry in order to set at naught the judgment of the court directing the tax to be levied and collected to pay the debt, for it could at its leisure appoint one collector for the ordinary county taxes, who would qualify and

collect these taxes, and another for the special levy, who would not qualify or collect that tax, and could repeat this from year to year indefinitely and treat with contempt all efforts of the creditor to collect his debt. It is hardly to be believed that such a result was ever intended by the Legislature of Kentucky.

II.

If the Statute, as Amended, is to be Construed as Authorizing the Appointment of Collectors for these Taxes Other than the Collector of the Regular County Taxes, the Amendment Impairs the Obligation of the Contracts Sued on and is Void so Far as the Collection of these Judgments is Concerned.

The judgments here sought to be enforced are upon bonds issued by Taylor County in 1887, under an Act of 1878. At the time of the issual of these bonds the statute authorizing the appointment of a collector read as follows:

> "If the sheriff shall fail to give such bond, when required by the County Court, he shall forfeit and vacate his office of sheriff; and in such case the County Court may appoint a collector of the county levy, who shall give bond, with surety, in such form, suited to the occasion, as is prescribed herein, and whose powers and liabilities shall be the same as those of the sheriff, acting as such." (General Statutes, Ch. 27, Art. 2, Section 5.)

Clearly only one collector could then be appointed for all county levies and his liability was as broad

as that of the sheriff. While that statute was changed in verbiage, no change in meaning was made up to the Act of 1906. The bondholders had the right to have taxes to pay their bonds levied by the proper county authorities and to have the sheriff or, if that office was vacant, a collector collect these taxes along with the other county taxes. The effect of this was that, if a county became obstinate and refused to pay a judgment rendered on its bonds, it could be compelled to levy and collect a tax to pay same or else refrain from collecting any other county taxes. If this amendment is to be construed to authorize the appointment of one collector for the tax to pay the bonds and another for the ordinary county revenue, then the collector of the ordinary county revenue can qualify and proceed with the collection of those taxes and the person appointed collector of the special taxes can and will refuse to qualify, and the judgment of the court will be nullified, and the bondholders left without any adequate remedy. Such has been the practice in the past, and the purpose of this writ of error is to reverse the judgment below, so that this practice may be continued. The constitutional provision against the impairment of the obligation of a contract prohibits the taking away or impairment of the remedy that existed at the time the contract was made, unless an adequate and sufficient remedy remains or is created in the place of the one taken away.

In United States, *ex rel.*, Hoffman, v. Quincy, 4 Wallace, 535, the Supreme Court said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement.
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> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. * * *
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> * * * * * * *
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> "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution, and to that extent void."

Again in Louisiana v. Pillbury, 105 U. S. 278, that court said:

> "The only ground on which a change of remedy, existing when a contract was made, is permissible without impairment of the contract, is that a new and adequate and efficacious remedy be substituted for that which is superseded."

In County Court of Ralls County v. United States, *ex rel.*, Joseph M. Douglass, 105 U. S. 733, it is said:

> "Under the well-settled rule of decision in this court, the Circuit Court had authority, by mandamus, to require the County Court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent."

See also Seibert v. United States, 122 U. S. 284.

The change in the remedy here (if the plaintiff in error be right in their construction of the statute) is quite different from that involved in abolishing imprisonment for debt. As stated in United States, *ex rel.*, Hoffman v. Quincy, *supra:*

> "The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial."

A man's debts are payable out of his property. After the laws were enacted forbidding imprisonment for debt, creditors still had ample remedies for their debts. They were entitled to executions against the property of their debtors. If the debtors

concealed their property so that an execution would not reach it, they had the right to resort to equity for a discovery of such hidden property and the subjection thereof. No process against the debtor's property was taken away. If these proved ineffectual it was because the debtor had nothing with which to satisfy the debt.

In the case at bar the circumstances are very different. The debts of the county are charges against all the property in the county, yet that property can not be reached by execution on the judgment against the county or by other process issued by the court. Only by the levy and collection of a tax can this property be made to respond to the judgments. If the law is changed so as to render the collection of such taxes more difficult, the only remedy the creditor has is impaired. When these bonds were issued and sold, the law then in force provided that the tax levied to pay them should be collected by the same officer who collected the other county taxes, either the sheriff or a collector. This law entered into the contract, and one thing the purchaser of the bonds contracted for was the right to have the sheriff, or the collector of the regular county taxes, collect the taxes to pay the bonds. That right can not be taken from him without the substitution of an adequate remedy. The remedy offered is the appointment of a separate collector for the taxes to pay the bonds, with the assurance that no person so appointed will accept the office or qualify and with no means of

forcing any one to qualify. This is no remedy at all.

In this connection we would call the attention of the court to the fact that the County Court selects the collector that is appointed. There is no way to control the discretion of that court in making this selection. Even if the creditors could find a number of persons, properly qualified, who would accept the position of collector of this special levy, no court could require the County Court to appoint any of them to the position. With a County Court determined to defeat payment of these debts, it is very evident that, if respondents have no remedy other than the appointment of a special collector, they have no adequate remedy at all.

While the remedy contained in the statute may not be effective at once, it is reasonably certain that eventually it will work satisfactorily. It is not reasonable to believe that any county, anywhere, will long refuse to collect the taxes necessary to successfully conduct the county's business in order to defeat the payment of an honest debt. The orders of mandamus in all cases but two have been recently entered. The order in those two cases have not been prosecuted with vigor until now, and have been evaded to some extent in ways that can not now be repeated.

To say to Taylor County that it must collect the taxes to pay these judgments or collect no taxes, is in a sense the use of force, of a "club" if you please. Frequently the "big stick" must be used to compel

obedience to the law. The ordinary debtor is told that he must pay his debts or he will be subjected to the payment of costs and his property seized for the satisfaction thereof. And to the man who would break his contract the law says if you do, I will force you to make satisfaction. What is the difference in principle between saying to a man from whom you take his property to pay his debts, you can not hold and enjoy this property while your debt to another stands unsatisfied, and saying to Taylor County you can not collect, use and enjoy your ordinary revenues unless you satisfy this debt. If this is a club, it is a club made necessary by the stubbornness of the county. The debts are just and undisputed, and duty to satisfy same is unquestioned and the ability to pay is undenied. Should not some force be applied in such a case?

But it seems strange that Taylor County, which is now avoiding the payment of these debts by not having a collector of any county taxes, should plead the hardship that thus results, and upon *that ground* ask this court to hold that it may appoint a separate collector of the ordinary county taxes, *so that it may continue to defeat the payment of these judgments without inconvenience to its people or its local affairs.* It is not contended that the county is not well able to pay the taxes ordered levied or that there is any just defense to the bonds. It is a plain case of a debtor endeavoring to evade paying its just debts, although *able so to do.* It takes good nerve for a

county that is able to pay its debts to go into the highest court in the land and ask that court to so construe a statute as to enable it to make effective its repudiation of its admittedly just debts, and to ask this upon the ground that to hold otherwise would require it to pay its debts or not enjoy the blessings that would come from the collection of other county revenues.

If this amendment was passed to meet the situation in Taylor County and authorize the appointment of more than one collector, this was not done because the Legislature found that the county government was paralyzed by its inability to procure a collector, as suggested by counsel, but for the purpose of enabling the county to defeat these debts by the appointment of a separate collector and his refusal to qualify. At the time of the enactment of this amendment the collection of county taxes had not stopped and there had been no paralysis of the county government, and it was not known that such condition would come about. Therefore, if Taylor County was in the mind of the Legislature, its action was not to relieve a suggested condition that did not in fact exist, but to enable the county to successfully repudiate its bonds. It was to substitute a shadow for the substance, and clearly was a breach of the Constitution.

Therefore, if the Act of 1906 is to be construed to authorize the appointment of more than one collector, it is void as to the debts here in question.

III.

The Refunding Act of 1878 Required the Appointment of One Collector of all County Taxes by the County Court.

It is next contended that the Refunding Act of 1878 provided a remedy for the bondholders by authorizing the Circuit Court to levy a tax to pay the bonds and to appoint a special collector of said tax, and that this remedy is exclusive. Without stopping, at present, to discuss the legality of the attempt to confer upon the *Circuit Court* the power to levy this tax and appoint a collector thereof, we would direct the court's attention to other provisions of that Act. By Section 5 (see Appendix to Brief for Petitioners) it was made the duty of the sheriff to collect the taxes levied under that Act. In case the sheriff failed to qualify, "it shall be the duty of said County Court to declare, by order of record, his office of tax collector forfeited. And in that case it is made the duty of the said County Court to appoint a tax collector, and take bond from him, with good and approved surety. * * * And if any sheriff or tax collector shall fail to collect or pay over the taxes, as provided in this Act, to the county treasurer, such sheriff or collector so in default shall, with his sureties on his official bond, be liable to an action," etc.

This provides for the appointment of one tax collector in case the sheriff fails to qualify. It does

not authorize the appointment of a special collector for this particular tax, but a general collector, who should perform the tax collecting duties of the sheriff, the sheriff's office of tax collector having been declared forfeited. Not only did the general laws governing the collection of taxes make provision for but one collector of all county taxes, but this Act, under which these bonds were issued, provides for only one such tax collector. Manifestly respondents expressly contracted for the right to have the taxes that should be levied to pay their bonds collected by the collector of other county taxes. It is true that, in addition to this right, the Legislature undertook to grant the additional right to have a tax levied and a collector appointed by the *Circuit Court, in case the county failed to collect the tax.* But this in nowise took away the duty of the County Court to appoint a collector to collect this and all other county taxes. (Tucker v. Hubbert, 196 Fed. Rep. 849.) *The right to the performance of this duty by the County Court was a contractual right that could not be taken away by the Act of 1906.*

Instead of the Act of 1878 strengthening the position of the petitioners, it makes it even clearer, if possible, that respondents were entitled to the relief granted.

The attempt to confer upon the Circuit Court or circuit judge the power to levy a tax and appoint a collector thereof, however, was not valid. The power to levy taxes is legislative and the power to collect

is executive or ministerial. Under the Constitution of Kentucky, the Legislature could not confer these powers on the Circuit Courts, which have purely judicial powers. This question came before the Court of Appeals of Kentucky in the case of Muhlenburg County v. Morehead, 20 Ky. Law Reporter, 376. That was a suit for a mandamus to require the levy of a tax to pay certain bonds issued by Muhlenburg County under an Act containing this provision:

> "Sec. 20. Should the County Court, held by the county judge and justices of the peace or by the county judge alone, fail for ten days, after demand in writing to levy and proceed in good faith to levy and collect a tax as provided in this act, then, and in that event, it is hereby made the duty of the Circuit Court or judge thereof in vacation, upon being informed of such failure and satisfactory proof thereof being made by any *bona fide* bondholder or his attorney, to levy and have collected a tax sufficient to pay off the principal and semi-annual interest on past due bonds or coupons issued in pursuance of the provisions of this act."

A demurrer was filed to the answer of the defendants. In discussing this the court said:

> "As the demurrer reaches back to the petition, and as this pleading does not aver that after the failure and refusal of the county judge and justices to perform their duty under the act, the Circuit Court or judge thereof was applied to as provided in Section 20, therefore, say counsel, mandamus does not lie because every remedy provided by the act has not been exhausted.

"The answer to this contention is that the provisions of the act attempting to impose on the Circuit Court or judge thereof the duty of levying and collecting taxes is unconstitutional and void.

"These duties and powers are legislative in their character, and can not be conferred under our Constitution (Sections 27 and 28) upon a strictly judicial tribunal or officer. This was authoritatively determined in Pennington v. Woolfolk, 79 Ky. 13."

Therefore so much of the Act of 1878 as undertakes to confer on the Circuit Court or circuit judge the power to levy a tax to pay these bonds and to appoint a collector is unconstitutional and void, and the only relief offered by the Act is the collection of this tax by the sheriff, or, in case of a vacancy in that office, by the collector of county taxes.

IV.

The Matters Relied on by Petitioners Are All Res Adjudicata as to the Lewis Apperson Suit No. 974.

This is but a second appeal in the same suit that was before the Circuit Court of Appeals in Tucker v. Hubbert, 196 Fed. Rep. 850. From an examination of that case it will be seen that the proceedings were had for the use and benefit of Lewis Apperson to enforce the payment by Taylor County of the same judgment, bearing interest from the same date. On March 19, 1909, an order had been entered requiring the Fiscal Court to levy a tax to pay the judgment.

It having been subsequently reported that the collection of the tax had failed, a mandamus was issued requiring Tucker, who was then the County Judge,

> "when he next appoints a sheriff, collector, or other officer to collect the county revenue of Taylor County, to embrace in the same order of appointment a direction to the officer appointed to collect both the levy heretofore made to pay the judgment in this case and the levy made or to be made for county purposes; and to require of such appointee one bond to cover the collection of each and all of said taxes."

From that order Taylor County appealed. In the United States Circuit Court of Appeals it relied upon the same propositions it now contends for in the case at bar. It then urged that Apperson's remedy, if any, was under the Act of 1878. This matter was disposed of adversely in paragraph three of the opinion (p. 851). It was also urged that the Court had no right to require the County Judge when he appointed a collector for the county revenues to appoint the same person to collect the levy for this debt and to require of him one bond. This matter was disposed of adversely to the county in the fifth paragraph of the opinion (p. 858). It was also urged that the effect of the writ would be to control the discretion of the County Judge respecting the appointment of a collector. This matter was disposed of adversely to the county in the sixth paragraph of the opinion (p. 858).

The decision of the United States Circuit Court of Appeals was allowed to become final. Taylor County seemingly acquiesced therein and entered into an agreement for a compromise settlement of the judgment, which it never complied with. But by reason of the delay caused by the appeal and the compromise agreement, the five years' limitation for the collection of the levy of 1909 had expired. This made it necessary to procure the mandamus, under which the present levy was made. The validity of this is not questioned; but the petitioners claim that the steps Apperson is taking for its collection are illegal and *rely upon precisely the same matters that were finally disposed of on the former appeal.* Taylor County is bound by the matters adjudicated in that case. The fact that Tucker was then County Judge and Hendrickson is the present County Judge makes no difference.

In Thompson v. Maxwell Land Co., 168 U. S. 456, this court said:

> "It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error can not be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case."

And again, in Great Western Telegraph Company v. Burnham, 162 U. S. 343, this court said:

> "It is true that the Supreme Court of Wisconsin upon a second appeal from an inferior

court, has always declined to reconsider any question of law decided upon the first appeal. Downer v. Cross, 2 Wis. 371, 381; Noonan v. Orton, 27 Wis. 300; DuPont v. Davis, 35 Wis. 631; Lathrop v. Knapp, 37 Wis. 307; Oshkosh Fire Department v. Tuttle, 50 Wis. 552. It does not, however, as appears by the two cases last cited, when that question is the only one presented by the second appeal, dismiss that appeal for want of jurisdiction; but it entertains jurisdiction, and affirms the judgment. In so doing, that court has done no more than this court has always done, or than is necessary to enable an Appellate Court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal."

So even if it were conceded, which it is not, that the Court of Appeals of Kentucky in the subsequent case of Commonwealth v. Moody, has construed the Kentucky statute in regard to the appointment of one collector with one bond adversely to our contention, it would not affect Apperson's right under a judgment that had already become final. It may be that if the county had appealed to this court in the case of Tucker v. Hubbert, and while the appeal was still pending the State Court had construed the statute, this court may have followed that construction, even if it required a reversal of the decision in the Circuit Court of Appeals. But there was no appeal to this court in Tucker v. Hubbert. But in the case at bar Taylor County is seeking by indirection to set

aside a judgment that has long since become final. We, therefore, suggest that in any event the judgment in the Apperson case should be affirmed.

And for the reasons set out in the first part of this brief we ask that the judgments of the District Court and the Circuit Court of Appeals be affirmed as to each of the respondents. When the county finds that it can not repudiate these debts and at the same time collect taxes for all of its current purposes, it will doubtless carry out its next agreement for the settlement of this controversy.

Respectfully submitted,

L. A. FAUREST,
Attorney for Respondents, Elizabeth Creager, Hugh S. Gardner and Mildred A. Hocker.

A. E. RICHARDS,
Attorney for Respondents, Lewis Apperson and Sterling Land & Improvement Co.

RICHARDS & HARRIS,
Of Counsel.

APPENDIX.

First Section Act of 1878.

That the County of Taylor be, and it is hereby, authorized and empowered to make and enter into any contract or contracts, with any person or persons, corporation or association of persons, for the compromise, purchase, or redemption of any and all bonds, coupons, judgments, or other indebtedness of said county, whether the same be due or not due, growing out of the issue of any bonds or coupons heretofore issued by said county; and said county, acting through its County Court, and such agents as may be appointed by the County Court of Taylor County, are hereby authorized and empowered to execute and carry out such contracts, and for that purpose it is hereby authorized to issue, negotiate, and deliver new bonds of said county, not exceeding one hundred and twenty-five thousand dollars, in such amounts as it may deem best, and on such time as the county may think proper, and bearing any rate of interest not exceeding eight per cent per annum, with coupons attached to represent the interest, payable semi-annually at such time and place as it may think best. The bonds to be signed by the county judge and county court clerk, with the seal of said county attached, and the coupons on said bonds to be signed by the clerk alone. And it shall have the right to sell all or any number of said bonds at not

less than their par value, the proceeds of which may be used to buy the present outstanding bonds of Taylor County, at rates not to exceed fifty cents on the dollar, or to exchange the same with the holders of bonds of Taylor County now outstanding, upon such terms as may be agreed to by the holders and the said County Court of Taylor County and its agents, upon the surrender and cancellation of the old bonds: PROVIDED, That in such exchange no greater rate shall be allowed in such exchange than fifty cents on the dollar for said old bonds. And the county clerk of said county shall keep a record of all bonds issued under this Act, showing the date of such bond, when payable, the amount thereof, and the number of coupons attached to each bond, which record shall also show the number and amount of bonds sold, and the number and amount exchanged for other bonds of said county. The records shall also show the number, amount of bonds, and coupons taken up and canceled by sale or exchange of the new bonds, and said record shall be open at all times to the inspection of the taxpayers of said county.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

Number 427

W. T. HENDRICKSON, JUDGE
OF COUNTY COURT OF
TAYLOR COUNTY, KY., - - - PETITIONER

VS.

LEWIS APPERSON - - - - - RESPONDENT

BRIEF FOR RESPONDENT

LEWIS APPERSON
Attorney for Respondent

RICHARDS & HARRIS
of Counsel

CLAY MILLER, PRINTER, MT. STERLING, KY.

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BRIEF FOR RESPONDENT

This action appears to be improperly styled, as the record only shows one party as respondent. However, the one named is the real party in interest, though the action was instituted in the name of Marc Hubbert for use of Lewis Apperson.

In order to properly present the question of law, we desire, it is neccessary to give a short history of this litigation.

The original action upon which judgment was rendered April 10, 1899, for $2963.99, with interest from that date and costs, was instituted in the name of Marc Hubbert vs. Taylor County Kentucky. Execution was issued upon same and was returned in effect "no property found."

The Act under which the bonds were issued, which were the basis of the action, provided a special remedy which was sought to be enforced, but this Court in the action of Hubbert vs. Campbellsville Lumber Company, 191 U. S. 70, decided the conditions precedent had not been complied with, hence, could not be enforced.

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*All italics in this brief are ours.

Shortly after this decision Hubbert was adjudged a Bankrupt and his judgment in this case was sold by the Trustee in Bankruptcy to Respondent, Lewis Apperson. He afterwards instituted an action in the United States District Court for the Western District of Kentucky in the name of Marc Hubbert for use and benefit of Lewis Apperson, against E. M. Tucker, Judge of Taylor County, and the Magistrates of said Court constituting the Fiscal Court of same, seeking to have the same relief asked for in the present proceeding, which the Court granted. The Fiscal Court making the levy, and E. M. Tucker, the County Judge, were directed by the Court as follows:

> "When he next appoints a sheriff, collector or other officer to collect the County Revenue of Taylor County to embrace in the same order of appointment a direction to the officer appointed to collect both the levy heretofore made to pay the judgment in this case and the levy made or to be made for county purposes; and to require of such appointee one bond to cover the collection of each and all of said taxes."

From this order an appeal was taken to the United States Circuit Court of Appeals and the judgment of the lower Court was affirmed. (See opinion in case of E. M. Tucker, &c. vs. Marc Hubbert, for use and benefit of Lewis Apperson, 196 Federal Reporter, 849.) No appeal was ever prayed for or taken in that case to this Court.

Shortly after the rendition of said opinion steps were taken by Taylor County looking to a compromise and was partially consumated, but finally failed, and in the meantime the levy made to pay the judgment had become barred by Statute of Limitation and a new levy had to be made.

The term of office of Tucker, County Judge, having expired and the plaintiff in error having been elected, he was made a party defendant and also the members of the Fiscal Court, and the orders made in that case appear in the record in this case in which the petitioner is directed as County Judge and his successor in office, if any, constituting the County Court of said County, when he next appoints a collector whose duty it is to collect the County ~~levy~~ which may had been made, or may hereafter be made, for any purpose, to embrace in said order of appointment a direction to such officer appointed to collect both the levy made or which may hereafter be made to pay this judgment, and the levy made or which may hereafter be made for any and all items which are levied or which may be levied by said Fiscal Court; and said County Judge acting as said County Court shall continue to so embrace such instructions in the same order of appointment until a collector is appointed who shall qualify as such collector by executing the proper bonds; and said County Judge shall exact of him but one bond under which he is bound to collect the levy made or which may hereafter be made to pay the judgment as aforesaid, and the item or items for any levy made or which may hereafter be made by said Fiscal Court for any other purpose, except he shall exclude from the same any levy made by the Fiscal Court of Taylor County for school purposes and also the five cents on each $100.00 of State revenue for the construction of public roads, as provided for by Sec. 4356-X, Sub-Section 4 of the Kentucky Statutes, and said defendant and his successor in office, if any, shall continue so to do until this plaintiff's said judgment and the costs as aforesaid have been paid in full.

The same matter now presented in this proceeding having been presented heretofore in the case of Tucker &c. vs. Hubbert for the use of Apperson, and having been finally determined by the United States Circuit Court of Appeals, in that the petitioner is now estopped to present or litigate the questions in issue any further; for the opinion in the case of Tucker &c. vs. Hubbert &c., supra, is final and conclusive as between the County Court of Taylor County and this respondent.

The fact that a different individual is county judge now will not authorize the same questions to be raised each time a new judge occupies that position or represents the County Court. It is the *Court* and *not* the individual that makes the order—the individual being merely the Judge constituting the County Court, and the order directing the individual County Court to make a certain order in his court is binding on his successor in office, and this really being the same action that was instituted by Marc Hubbert for the use and benefit of Lewis Apperson, the judgment of the United States Circuit Court of Appeals is final and conclusive.

The case of the Commonwealth against Moody, 150 Ky. 571, which is relied upon by counsel for petitioner in this case, was construed by the United States Circuit Court of Appeals in the case of Tucker against Hubbert. The question here presented was overlooked and not presented in the lower courts.

CONSTRUCTION OF STATUTES

GENERAL STATUTES IN FORCE IN 1887 AT THE TIME BONDS SUED ON WERE SOLD ARE AS FOLLOWS:

SECTION 1 OF ARTICLE 9, CHAPTER 92.

"SEC. 1. The sheriff, by virtue of his office, shall be collector of the revenue. If he fail or refuse,

without a valid and legal excuse, to execute bond, with surety, as required by law, for the collection of the revenue, he shall forfeit his office. (a) The county court shall thereupon appoint a collector of revenue for that year. (b) The court shall take of said collector a bond with good surety for the faithful execution of the duties required of him by law. Said collector shall be governed by the laws regulating the duties of sheriffs in the collection of the revenue, and he and his sureties shall be jointly and severally liable to the Commonwealth, and all others, in the same manner that the sheriff and his sureties would have been. In the event that the county court fails to make such appointment for thirty days, the Auditor may appoint a collector for that county."

SECTIONS 4, 5 AND 6, ARTICLE 27.

"SEC. 4. The sheriff, by virtue of his office, shall be collector of the county levy, and he shall, at the term of court when the county levy is imposed, or at any subsequent term of said court, before he proceeds to collect the county levy, execute bond, payable to the Commonwealth of Kentucky, with one or more sureties, whose aggregate estate, subject to execution, after the payment of all their debts and liabilities, shall be equal to double the amount of the whole levy ordered to be collected, in form substantually as follows:"

"SEC. 5. If the sheriff shall fail to give such bond, when required by the county court, he shall forfeit and vacate his office of sheriff; *and in such case the county court may appoint a collector of the county levy, who shall give bond with surety, in such form, suited to the occasion, as is prescribed herein, and whose powers and liabilities shall be the same as those of the sheriff, acting as such.*"

"SEC. 6. The clerk of the county court shall, on or before the first day of June in each year, deliver to such sheriff or collector a list of the persons chargeable with the payment of county levy, and the sum to

be paid by each; a list of the sums due, and from whom due, to the county; and also a list of persons to whom the county is indebted, and the amount to be paid by the sheriff or collector to each one. The sheriff or collector shall immediately proceed to collect from the persons chargeable with county levy, or otherwise indebted, the amount due, with the same powers, duties, responsibilities, and for the same commissions given and allowed the collectors of the public revenue; and and shall pay the same to the county creditors, according to their respective demands, and in obedience to the requirements of law."

It will be noticed under Section 5 that the collector appointed by the County Court has same powers and liabilities as the sheriff and as shown in the Wade case the Sheriff or collector is bound for all the levies without any mention of same in the order of appointment.

KENTUCKY STATUTES NOW IN FORCE

"SEC. 4129. (1) SHERIFF TO COLLECT. The Sheriff, by virtue of his office, shall be the collector of all State, county and district taxes, unless the payment thereof is, by law, especially directed to be made to some other officer."

"SEC. 4131. (3) FAILURE TO EXECUTE BOND FORFEITS OFFICE - APPOINTMENT OF SHERIFF OR COLLECTOR. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, *or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff;* and in the event the county court fails for thirty days to appoint a collector of the money due the State, the Auditor of Public

Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the county court, and if the bond be not executed within said time the appointment of another collector may in like manner, be made and qualified."

AMENDMENT OF 1906. "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the county court appointing him."

"SEC. 931. COUNTY TREASURER. He shall keep a book or books to be furnished him by the fiscal court, and paid for by the county, in which he shall keep a correct and accurate account of all money received and disbursed by him for the county, showing when, from whom, and on what account paid; and he shall so arrange and keep his books that the moneys received and paid out by him shall be exhibited in separate and distinct accounts, and the money so received shall not be disbursed for any other purpose than that for which it was collected and paid over to him."

"SEC. 932. It shall be the duty of the sheriff or other collecting officers of the county to pay to the county treasurer, on the first day of May, and every sixty days thereafter, all money in his hands collected by him for the county, taking a receipt therefor from the county treasurer for the amount so paid, in duplicate, one copy to be retained by the sheriff and the other to be delivered by him to the county judge, who shall file the same in his offiice."

"FISCAL COURTS. SEC. 1884. COLLECTOR TO GIVE BOND—COMPENSATION AND SETTLEMENTS—PUBLICATION OF STATEMENT. That the sheriff or other officer who may collect these taxes shall, annually, before he proceeds to do so, execute bonds to the Commonwealth of Kentucky, in the county court of each respective county, with one or more sufficient sureties, in a sum equal to double the amount of the taxes likely to come into his hands, for a faithful performance of his

duty, and to pay over in due time to the proper party, as directed by the court, all money collected by him; said bond to be approved by order of the county court, and when approved, to be recorded in the order-book, and safely kept by the County Court Clerk."

The Kentucky Statutes were adopted in 1893 and the duty of the Sheriff or Collector was the same as under the General Statutes until the amendment of 1906 when it was made the duty of the County Judge to embrace in any order appointing a Collector of the County Levy to embrace in the order all of the items of the County Levy that must be covered by his bond. This was merely a ministerial duty, not one of discretion and if a county judge should intentionally omit any item of the Levy made by the Fiscal Court he would be liable to indictment for misfeasance in office and his action in doing so would be evidence of his perversity or a dishonest purpose to prevent the payment of an honest debt. And the amendment of 1906 was never intended to permit any such act upon the part of a county judge. It will be noticed that if the sheriff qualifies he is bound on his bond for all of the County Levy and the amendment of 1906 does not apply to him.

The amendment of 1906 was evidently suggested by the proceedings in the Wade case before it reached the Court of Appeals. Wade had qualified as Collector in January and given bond, and the levy to pay the debt of Columbia Bank was made several months afterward and Wade was held liable. Under the amendment of 1906 he would not be held liable unless it was embraced in the order of appointment. Can it be said that a county judge would be allowed intentionally or knowingly to omit from the order appointing a collector any

item of the levy made by the Fiscal Court. The making of the levy is an order and direction to county judge to embrace every levy in the order of appointment and the idea that he could appoint one collector to collect such items as he desired collected and omit others he might prefer not to collect. Such was never the intention of the act.

A reasonable construction of Section 4131 Kentucky Statutes is that the requirement to embrace in the order of appointment the items of the County Levy in order, is that the Collector and his bond may know just what he is bound for.

However if under any strained construction of the amendment of 1906, it could be held that the County Judge had the discretion to appoint more than one collector of the County Levy and embrace in the order of appointment only such items as he desired collected when there was another levy made to pay an honest debt but the County Judge did not want it paid, and he intentionally omitted it in the order of appointment and then to explain his action say he could not find any one who would qualify as collector to collect it. Such authority was never intended to be given.

The record in this case shows conclusively that the plaintiff in error and those preceding him have done everything they could possibly resort to to prevent the collection of this debt though no defense has ever been suggested as to the obligation or legality of the debt. This litigation began in 1899 and this is the second time it has been brought to this Court and it was also taken to the United States Circuit Court of Appeals in the ~~Wade~~ Tucker case. As said by Kentucky Court of Appeals in Commonwealth vs. Wade:

"It seems to us high time that it should be taught as a practical lesson; as well as a theory, that there are none so high as to be above the restraints of the law, or so low as to be beneath its protection."

CONSTITUTIONALITY

Counsel for plaintiff in error insists that under the construction placed upon the amendment of 1906 to section 4131 of Kentucky Statutes that the County Court has the right and discretion to appoint as many collectors or special collectors as he desires, this authority we deny and under our idea of the law the County Judge sitting as the County Court, has power *first* to appoint a collector for the county of *all moneys* due the State, County or Taxing District authorized to be collected by the sheriff or it may appoint a separate collector of *all moneys* due the State, County or any Taxing District thereof during the vacancy of the office of sheriff. But when he makes either of said appointments he must state in the order of appointment all of the taxes he is bound to collect.

If it is discretionary with the County Court under the amendment of 1906 which items of the County Levy he will embrace in the order, then we say the change in the statute is unconstitutional as to our debt — as the remedy now is altered to such an extent as to very materially affect or prevent the collection of our debt.

It will be noticed that Section 4131 of Kentucky Statutes, when referring to the appointment of collector it says, in referring to the County Court: "or it may appoint a *separate collector of all the moneys* due the State, County or Taxing District. The words "*a separate collector* for *all* the moneys due the county" means one collector of *all* the moneys due the county—the statutes *a collector* means one collector and *all moneys* means every levy.

It appears to counsel for defendant in error that the only reasonable construction of Section 4131 as amended is that the County Judge may appoint a collector to collect all of the State Revenue, a collector to collect all of the County Levy, a collector to collect any District Taxes, but when he appoints either of such collectors he must mention in the order of appointment the taxes that he is required to collect, or he might appoint one collector to collect all taxes due State, County and any District.

The excuse that the County Judge is unable to find any one who will qualify as collector of the ordinary County Levy and the Levy to pay this debt does not relieve him from or is it any excuse for being relieved from the order in this case.

Does the amendment of 1906 impair the obligation of the contract or any remedies thereunder, if it does then it is unconstitutional.

In the case of Collins vs. Collins, 79 Ky., 91, the Court says:

> "The State has the right to alter the remedy, subject to the limitation that the alteration does not impair the obligation of contracts."

And again, page 92, the Court says:

> "In this respect the obligation is not to be impaired at all."

The current of authority establishes, without serious conflict as we conceive—

1 "That the remedy is included in the obligation of contracts. (Blair vs. Williams, 4 Littell.)"

2 "That the remedy cannot be so altered as to materially impair the obligation of contracts. (Green vs. Biddle, 8 Wheaton.)"

3 "That if the impairment be material to any extent, it is forbidden. (Edwards vs. Kersey, 6 Otto.)"

4 "That the laws in force when and where the contract may be made form a part of it. (Von Hoffman vs. City of Quincy, 4 Wall 535.)

Hence it results that if the construction put upon the amendment of 1906 by counsel for plaintiff in error is correct; and the result is material impairment to any extent it is forbidden. We say that it undoubtly does impair the remedy as it existed when the contract was made.

Prior to the amendment there could not have been any question made as the legality of the order directing the County Court what to do. In fact that would have been unnecessary as the only thing necessary would have been the Levy by the Fiscal Court to pay the debt either voluntarily by the court or upon mandamus, and then the Sheriff if there is one or any collector appointed to collect the county levy upon giving bond would be liable for every item of the county levy without any mention being made of the special items contained in the levy as in the Wade case.

All the decisions of this Court invariably hold that the remedy may be changed or altered, provided it does not deny a remedy or so embarass it with conditions or restrictions as seriously to impair the value of the right. If the construction of the amendment of 1906 is as claimed by counsel for plaintiff in error, the remedy of defendant is embarrassed, with conditions as seriously impair the value of the right.

We respectfully ask that this case be affirmed.

LEWIS APPERSON
Counsel for Respondent

RICHARDS & HARRIS
of Counsel

FILED
OCT 1 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 427.

W. T. HENDRICKSON, - - - *Petitioner*

vs.

LEWIS APPERSON, - - - *Respondent*

BRIEF OF ERNEST MACPHERSON AMICUS CURIAE

The Standard Printing Co. (Incorporated) Louisville, Ky.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 427.

W. T. HENDRICKSON, Petitioner,

vs.

LEWIS APPERSON, Respondent.

On *Certiorari* to U. S. Circuit Court of Appeals, 6th Circuit.

Motion to allow Ernest Macpherson, of Louisville, Kentucky, to file Brief as *Amicus Curiae*.

Comes now Ernest Macpherson, a citizen of Kentucky, and member of this bar and moves this Honorable Court to allow him to file a brief in the above entitled cause as *amicus curiae*.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 427.

W. T. HENDRICKSON, Petitioner,

vs.

LEWIS APPERSON, Respondent.

NOTICE.

To Helm Bruce, Esq., and A. E. Richards, Esq., Counsel respectively for the Petitioner and Respondent in the above entitled cause.

You are hereby notified that Ernest Macpherson, a citizen of Kentucky, and member of the bar will on the 2d day of October, 1917, move the Supreme Court of the United States on that day, or as soon thereafter as he can be heard, for leave to file, in the above entitled cause, a brief as *amicus curiae*, which brief is hereto attached.

.....

Service of the foregoing notice of motion with the said motion and the brief therein referred to is hereby acknowledged this .... day of September, 1917.

.....
Counsel for Petitioner.

.....
Counsel for Respondent.

POINTS AND AUTHORITIES.

Page

1. Original charter of Cumberland and Ohio Railroad in Section 15, gave to county judge all power to levy tax for bonds and appoint special collector, Acts 1869, Vol. 1, page 463 5-6

   Amendment of charter made its remedy exclusive. Act 1879, Vol. 1, page 248 7

   Quinlan vs. Green County, 205 U. S. 210 7
   Bass vs. Taft, 137 U. S. 458 8

2. Old county court had only power given by legislative acts. Constitution of 1850, Section 29, 33, 37; Carroll's Ky. Stats., page 61 9

   Levying railroad bond taxes not part of ordinary county levy. Merriwether vs. Muhlenberg County Court, 120 U. S. 653 10

3. Present Constitution transferred all power of old county courts to the county judge. Sections 140, 141. Levy by Fiscal Court void. Cooley on Taxation, 3d ed., Vol. 1, pages 546 and 652 11

4. Fiscal Courts have no power as such to levy taxes for old railroad bond. Sec. 1882, Carroll's Ky. Stats. 1915, Vol. 1, page 979 12-13

   Guthrie vs. Sparks, 131 Fed. 443 13

5. Refunding Act 1878 gives respondent his only remedy.
   U. S. vs. Macon County, 9 Otto 582 14
   Thompson vs. Allen County, 115 U. S. 550 15
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6. Judgment below was an injunction. Mandamus may not perform office of injunction. Glossop vs. Heston, 12 Ch. D. 102 18
   Legg vs. Annapolis, 42 Md. 203 18

7. Respondent's remedy is legislative. Preston vs. Sturgis, 183 Fed 1. 19

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 427.

W. T. HENDRICKSON, Petitioner,

vs.

LEWIS APPERSON, Respondent.

BRIEF OF ERNEST MACPHERSON, AMICUS CURIAE.

The opinion to be delivered in this case probably will affect judgments other than against Taylor County. Being interested in the other judgments it should seem to be not improper as amicus curiae to file a brief herein. It may be of benefit and assistance to the Court in reaching a conclusion to have briefly presented the laws of Kentucky and the decisions of courts, State and Federal, which are pertinent and show the history of the litigation with respect to the bonds issued on account of subscriptions to the old Cumberland & Ohio Railroad and particularly those acts and decisions relating to the levy and collection of taxes for the refunding bonds of Taylor County herein involved.

The Cumberland & Ohio Railroad Company was chartered by the Legislature of Kentucky in 1869. (Acts 1869, Vol. 1, page 463). The road failed and was never built. In 1878 the Legislature divided parts of the road as orig-

inally contemplated into two distinct corporations, to be known as the Northern and Southern Divisions of the Cumberland & Ohio Railroad Company. (Acts 1878, Vol. 1, page 549). The Southern Division was to be built through Marion, Taylor, Green and Allen Counties, which had issued bonds to the old company. This section was built by the Louisville & Nashville Railroad Company. (See Green County vs. Quinlan, 211 U. S. 582).

Section 15 of the charter provided for the subscription and issuance of bonds by the counties or cities through which the proposed road was to run, the levying of taxes to pay the bonds, and the machinery for collecting the taxes levied for the purpose. There was no general law of the State making provision for such objects, and the charter of the Cumberland & Ohio, like that of other roads of the time, contained the remedies for the collection of the taxes.

The method of collection was part of Section 15 in these words:

> "And the Mayor and Council or Aldermen of any city or the Mayor and Aldermen or Chairman and Board of Trustees of any town, or the County Court of any county having jurisdiction, may appoint collectors for said tax, or may require the sheriffs or marshals of the respective cities, towns, or counties, within the jurisdiction of the same, to collect the said tax, all of whom shall have the same powers and remedies, and shall proceed in the same way for the collection of said tax as the sheriffs in the collection of the State revenue."

The primary mode prescribed was the appointment of a special collector; the requirement of the sheriff to collect was alternative and discretionary.

Section 15 also declared:

> "And all the powers herein given to the County Court are hereby vested in the presiding judge of the County Court."

By Section 4 of the Act of March 11, 1870 (Laws of Kentucky 1869-70, Ch. 610, Vol. 2, page 226), it was provided that the sheriff of the county in which the tax should be levied should collect it at the same time he collected the State revenue. This required the special collectors also to collect at the same time that ordinary taxes were collected.

By a later act of 1880 the charter was amended as follows:

> "Section 1. That an act entitled 'An Act to Incorporate the Cumberland & Ohio Railroad Company,' approved the 24th of February, 1869, be amended as follows: That the remedy given in said act of the 24th of February, 1869, aforesaid for the collection of the bonds and coupons authorized to be issued and which were, in fact, issued under and by virtue of said act, is exclusive of all other remedies, and it shall apply to the collection of all bonds, coupons and judgments which have been, or may hereafter be, rendered on said bonds and coupons." (Acts 1879, Vol. 1, page 248.)

This applies to all bonds issued under the original charter.

Construing Section 15 of the charter the Supreme Court in Quinlan vs. Green County (205 U. S. 410), decided that to the county judge alone was given all power in respect of the issuance of the bonds. This ruling was based upon the words of the section vesting in the county judge all the powers given therein to the County Court. It follows that the appointment of collectors or sheriffs was, under the

charter provision, also vested alone in the county judge, the magistrates or justices of the peace having nothing to do with the business.

The Supreme Court in Bass vs. Taft (137 U. S. 458), considered Section 15 and passed upon the powers of the county judge in accordance with the contention here made that under the original charter the county judge alone had all the powers given to the County Court. The plaintiff (below) in that case, according to the opinion, stated in his petition

> "that, for the purpose of levying and collecting such tax, the powers granted by the statute were vested in the presiding judge of the County Court."

Issue was made on that allegation both in the court below and in this court; both courts upheld the plaintiff's claim on this point, though on another ground the Supreme Court reversed the judgment below.

It should not be an open question in this court that under Section 15 of the original charter of the C. & O. road the county judge alone, exclusive of the justices of the peace, had all the powers given by law to issue bonds when voted, to levy the tax, to pay them, and to appoint a special collector of the tax, or to require the sheriff to collect.

Under the express language of the charter the county judge had the right to appoint a special collector for the railroad tax whether the county had a sheriff or not. The law confided to him all right, power and discretion in the premises.

II.

Power and Composition of Old County Court.

All the special Kentucky acts mentioned in this brief were passed under the constitution of 1850.

That constitution (Kentucky Statutes, page 61) established a County Court and regulated its jurisdiction in these sections:

> "29. A County Court shall be established in each county now existing, or which may hereafter be erected within this Commonwealth, to consist of a presiding judge and two associate judges, any two of whom shall constitute a court for the transaction of business; provided the General Assembly may at any time abolish the office of the associate judges, whenever it shall be deemed expedient; in which event they may associate with said court any or all of the justices of the peace for the transaction of business."
>
> "Sec. 33. The jurisdiction of the County Court shall be regulated by law, and until changed, shall be the same now vested in the County Courts of this State."
>
> "Sec. 37. The General Assembly may provide by law that the justices of the peace in each county shall sit at the court of claims, and assist in laying the county levy and making appropriations only."

Taylor was the only county that issued any refunding bonds. This was under the refunding act of 1878, which was before this court in Hubbert vs. Campbellsville Lumber Company (191 U. S. 70), and is now again presented.

> "Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued." (U. S. ex rel. vs. Macon County, 99 U. S. 582).

A fortiori he knows the provisions of the constitution of the time. Every purchaser of the refunding bonds of Taylor County knew that the jurisdiction and composition of the then County Court could be changed at the legislative will, so long as a presiding judge was retained.

This Court, speaking through Mr. Justice Harlan, considered the sections of the previous constitution of Kentucky just quoted in Merriwether vs. Muhlenberg County Court (120 U. S. 653). In a somewhat elaborate opinion he reviewed the then constitution of Kentucky, the general laws, and the charter of the railroad in that case concerned. The learned justice said:

> *"It is clear that the levying and collection of a tax to meet a county subscription to the stock of a railroad company is not a business connected with the laying of the county levy, or with appropriations of money out of such levy.* (Our italics.) But it is insisted that it is a matter relating to the 'fiscal affairs' of the county, and is 'financial business of the county,' the control or management of which belongs, under the law, to the County Court, composed of the presiding judge and the justices of the peace. On the other hand, the plaintiff in error contends, this case is taken out of the operation of the general statute by the fact that the special statute, under which the county made the subscription and issued the bonds in question, imposes upon the County Court, held by the presiding judge, the absolute duty of levying the necessary tax."

This contention of the plaintiff was sustained by this court. The opinion is especially pertinent now in deciding that the levying of a railroad tax is not a part of the ordinary duty of the county or other court when required to lay the county levy, which is extraordinary and something entirely apart from the general "county purposes" or levy.

III.

The County Court As Now Existing.

The present constitution of Kentucky, promulgated in 1891 (Carroll's Ky. Stat. 1915, page 157), declares in Section 140:

"There shall be established in each county now existing, or which may be hereafter created, in this State, a court to be styled the County Court, to consist of a judge," etc. (Ky. Stat. 1915, page 110).

Sec. 141: "The jurisdiction of the County Court shall be uniform throughout the State, and shall be regulated by general law, and until changed, shall be the same as now vested in the County Courts of this State by law."

The County Judge alone now has all the powers of the old County Court however composed under the previous constitution and laws until the latter are changed by the Legislature. The refunding act of 1878 should, under the present constitution, be construed to transfer to or vest all the powers of the act therein given to the County Court in the county judge alone. The justices of the peace have no connection with the County Court. No attempt has ever been made to take away from the county judge (the County Court) any powers or duties given to former County Courts in relation to the levy or collection of taxes for old railroad bonded indebtedness. The elimination of the justices of the peace in this particular business was authorized by the previous constitution and really gave to the bondholders of Taylor County a simpler and better remedy for the collection of their debt than they had before, if the refunding act could possibly be construed as requiring a participation by the justices in the levy or otherwise. As the levy made herein was by the Fiscal Court and not by the County Court, an entirely distinct tribunal, which alone had the power, the assessment or levy was void; and being illegal any collector appointed to collect the illegal levy was without power to proceed, and the order to appoint a collector for an illegal tax was also void.

> "The power to tax being legislative, there must be direct authority of law for every levy upon the people under that power," (Cooley on Taxation, 3rd edition, Vol. 1, page 546), and "whatever preliminaries are by law made essential to the levy of a tax must be observed or the tax will be void." (*Ibid.*, page 562.)

The present constitution carefully preserved all rights under the old railroad charters and acts in relation to bonds by Section 1 of the Schedule (Carroll's Ky. Stat., page 155), which reads:

> "That all laws of this Commonwealth in force at the time of the adoption of this constitution not inconsistent therewith shall remain in full force until altered or repealed by the General Assembly; and all rights, actions, prosecutions, claims and contracts of the State, counties, individuals or bodies corporate, not inconsistent therewith, shall continue as valid as if this constitution had not been adopted."

IV.

Powers of Fiscal Courts.

Section 144 of the present constitution provides for a Fiscal Court:

> "Counties shall have a Fiscal Court, which may consist of the Judge of the County Court and the Justices of the Peace, in which Court the Judge of the County Court shall preside if present; or a county may have three Commissioners, to be elected from the county at large, who, together with the Judge of the County Court, shall constitute the Fiscal Court. A majority of the members of said Court shall constitute a Court for the transaction of business."

Some counties have one form and some the other. After the adoption of this constitution there followed a general revision of the laws of Kentucky. One was an act of April 18, 1892, in relation to Fiscal Courts. It now appears as

Section 1882 of the Kentucky Statutes of 1915, Carroll's Edition, which edition is constantly recognized by the Legislature as official. That section contains this sentence:

> "But this act shall not be construed so as to authorize the court of claims or fiscal court of any county to levy a tax to pay any railroad bonded indebtedness or any interest on any such indebtedness."

This declaration of the act of 1892 has never been modified or repealed expressly or by implication; no subsequent act contains any interfering clause, and the act or laws of Kentucky in relation to fiscal courts can not without violating the express words

> "be construed so as to authorize the Court of Claims or Fiscal Court of any county to levy a tax to pay any railroad bonded indebtedness."

The Circuit Court of Appeals for the Sixth Circuit, Judges Lurton, Severens and Richards sitting, in Guthrie vs. Sparks (131 Fed. 443), reviewed the Kentucky laws and this section particularly and decided that the revision of Kentucky laws after the adoption of the present constitution did not repeal the remedies given under the railroad charter therein involved; that it was still in force and governed the levy and collection of the taxes; and that the provision of Section 1882, Ky. Statutes, which

> "expressly excepts the power [by a Fiscal Court] to levy a tax to pay any railroad bond indebtedness, or the interest thereon," is not repealed by implication, etc.

The County Court consisting of the County Judge alone was held to have all power in relation to the levy of the tax and the appointment of a special collector.

V.

The Refunding Act of 1878 Gives Respondent His Only Remedy.

As the original charter of the C. & O. R. R. and also the refunding act of 1878, under which were issued the refunding bonds of Hubbert or Apperson (they are the same bonds), provided for a levy and a special collector by the County Court, the plaintiff, Hubbert, after obtaining judgment on the bonds, for some reason sought to find some remedy other than that for which the refunding bondholder had contracted. A suit was brought to enforce the judgment under a later special act in relation to Taylor County. The Circuit Court of Appeals held the proceeding void. The Supreme Court in Hubbert vs. Campbellsville Lumber Company (191 U. S. 70), affirmed the Circuit Court of Appeals. Thereupon the respondent, Apperson, who had obtained control of the Hubbert judgment, began a new proceeding or suit against both the County and Fiscal Courts, and notwithstanding the refunding act, which conferred all power on the County Court and in defiance of Section 1882 of the Kentucky Statutes, obtained a judgment requiring and enjoining the Fiscal Court, which had no jurisdiction to make the levy, and the County Court, to appoint no collector except a general one for the collection of all taxes. The judgment was affirmed by the Circuit Court of Appeals in Tucker vs. Hubbert (196 Fed. 849).

It was decided in the Tucker case (so reads the syllabus), that the States can not annul or abridge the jurisdiction of the Federal Courts as to controversies between

citizens of different States, and having jurisdiction to render a judgment, such a court has the power to enforce it by appropriate process, notwithstanding a statute providing a different remedy in a State court. The effect of the Tucker decision is that in a mandamus suit to enforce a judgment on municipal bonds the Federal Court is not governed by the State laws on the subject enacted for the particular purpose. This court has ruled to the contrary. In United States vs. County of Macon (9 Otto, 582), Mr. Chief Justice Waite said:

> "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We can not create new rights or confer new powers. All we can do is to bring existing powers into operation."

And later in the case the Chief Justice stated:

> "The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment."

One of the unfortunate counties issuing bonds for the Cumberland & Ohio R. R. was Allen County. In Thompson vs. Allen County (115 U. S. 550), Mr. Justice Miller, speaking for the court, said:

> "It is the power derived from the statute law of that State under which alone this tax can be collected. The issue of the bonds was by virtue of a special statute, and that statute prescribed the mode of levying and collecting this tax."

The County Court can do only what is authorized by the statute. (Bass, Judge of Taylor County, vs. Taft, 137 U. S. 464.)

The recent case of Yost vs. Dallas County (236 U. S. 461), is to the same effect:

> "The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending upon the sovereignty of the State, and therefore limited in whatever way the State saw fit to limit it, when, so to speak, it contracted to give the remedy. It is established that taxes of the nature now in question can only be levied and collected in the manner provided by statute," etc.

Chief Justice Waite in Ex parte Rowland (104 U. S. 604), said:

> "The law must not only authorize the act, but it must require the act to be done.' '

The opinion in Tucker vs. Hubbert cited Bonta vs. Fiscal Court of Mercer County (144 Ky. 241), as a ruling by the Court of Appeals of Kentucky that Fiscal Courts in Kentucky have power to levy taxes for old railroad bonded indebtedness. It is easily demonstrable that no such question was presented or could have been considered in the Bonta case. The Fiscal Court of Mercer County had the power to levy the railroad tax therein because the act authorizing the subscription expressly directed it. The Supreme Court in Provident Life & Trust Company vs. County of Mercer (170 U. S. 503), had before it the "act autnorizing Mercer County to subscribe aid to the Louisville Southern Railroad Company," approved May 15, 1886. Section 5 of this act provides that

> "an annual tax sufficient to pay the interest on such bonds, and the principal when it shall become due, shall be levied by the officers of such county, as provided in case of other county taxes."

This was a special provision of the act, and hence the question of the power of Fiscal Courts generally to levy railroad taxes could not have been before the court in the Bonta case. Section 1882, Kentucky Statutes, does not prohibit a Fiscal Court from levying a railroad tax. It does say "but this act shall not be construed so as to authorize" such a levy. In other words, the authority to levy and collect old railroad taxes must be sought for in the respective acts authorizing the bonds. The laws of Kentucky make no other method. No decision of the Court of Appeals of Kentucky has ever so much as hinted to the contrary.

The opinion in the Bonta case, as pointed out in the Tucker opinion, made a mistake in speaking of Section 1882 when it meant Section 1839 of the Kentucky Statutes.

The case of Commonwealth vs. Wade (126 Ky. 799), cited in the Tucker case, has no relevance in the present discussion. It related to an ordinary county debt; and the court was careful to say that "this judgment was not for money due under a special railroad tax." There could have been no possible reason for interpolating that clause except to obviate any inference that old railroad indebtedness was required to be collected by the same collector who received ordinary county taxes.

Moreover, the Wade case construed a statute differing in terms from the present Section 4131 of the statutes which latter has, upon full consideration by the same court, been held constitutional. (Commonwealth vs. Moody, 150 Ky. 571.) The Kentucky Court of Appeals also ruled in the Moody case that a separate collector could be appointed

under Section 4131 for any ordinary county levy. The decision in the Moody case was made before the Circuit Court of Appeals decided Graham vs. Quinlan, 207 Fed. 268. In the latter opinion the ruling of the Supreme Court of Kentucky in the Moody case was disregarded and the Circuit Court of Appeals also overruled Guthrie vs. Sparks, *supra*. The Hendrickson opinion merely followed the Tucker and Graham decisions.

The Circuit Court of Appeals, having ruled on the principal points in two contradictory ways, it is submitted here that the first (Guthrie vs. Sparks) ruling was the better law.

VI.

The judgment below was erroneous if not void because it was in substance an injunction issuing out of a common law court. It did not command the performance by the county officials of an affirmative duty imposed upon them by any statute which has been or can be cited. It commanded them to do certain things in a particular way and in such a form as to enjoin or restrain the doing of the things in any other way. A mandamus may not perform the office of an injunction. (Glossop vs. Heston, 12 Ch. D. 102; Legg vs. Annapolis, 42 Md. 203.)

It was said by this court in Heine vs. Board of Levee Commissioners (85 U. S. 655), that "*mandamus* is essentially and exclusively a common law remedy and is unknown to the equity practice." Is it not equally true that *injunction* is essentially and exclusively an equitable remedy and is unknown to the common law practice?

There was nothing whatever in the refunding act of 1878 which authorized or required any vote or participation of the people or taxpayers in the issuance of the bonds, nothing to require their wishes to be consulted.

However worded, the injunction really is addressed to the people of the county. Because the County Judge has no powers to compel anyone to qualify to collect the judgments the people, who were never parties to the contract and most of whom were born since the refunding bonds were issued, are told that unless some one of them shall undertake the office of collector the county shall as to ordinary county affairs and taxes be abolished. This is legislative, not judicial power. Besides the judgment gains nothing for the respondent. If no person in Taylor County will qualify to collect this judgment it matters nothing to him whether that person be a general or special collector. When the County Judge appoints a special collector his statutory duty is performed. (Bass vs. Taft, *supra.*) That the collector refuses to qualify is no fault of the County Court. His legal powers are exhausted.

There is an interesting collation of the laws in Preston vs. Sturgis (183 Fed. 1). The opinion at page 19 concludes:

> "Is it to be said then that we have a case here of a wrong without a remedy? No. It is not a case of a wrong without a remedy. It is a case of a wrong without a judicial remedy. It is a case of a wrong where there is a remedy, but that remedy is legislative, not judicial. It is important that it should be maintained that wrongs should be remedied in the right way and not in a wrong way."

Respectfully submitted,

ERNEST MACPHERSON.